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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

CARMINE G. DE SAPIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

Opinion of the Court of Appeals
(November 16, 1970)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 158—September Term, 1970.

(Argued September 18, 1970 Decided November 16, 1970.)

Docket No. 34689

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARMINE G. DESAPIO,

Defendant-Appellant.

Before:

FRIENDLY, SMITH and HAYS,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* convicting Carmine DeSapio, after a verdict, of conspiring to violate 18 U.S.C. §§1951 and 1952 and of two substantive violations of 18 U.S.C. 1952, and from an order denying a new trial. Affirmed.

MAURICE EDELBAUM, Esq. (Edelbaum, Abrams, Feitell & Edelbaum, New York, New York, Lawrence K. Feitell, Esq. and Henry J. Boitel, Esq., of Counsel), *for Defendant-Appellant.*

JACK KAPLAN, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Arthur A. Ministeri, James Schreiber and Robert G. Morvillo, Assistant United States Attorneys, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge*:

In December 1968 a grand jury in the District Court for the Southern District of New York returned an indictment against Carmine DeSapio, Antonio Corallo, and Henry Fried. The latter's case was severed because of illness. After a four-and-a-half week trial, Corallo was convicted on one of the three counts charged in the indictment and acquitted on another, and the third count was dismissed as to him; he has not appealed.[1] Appellant DeSapio was convicted on one count of conspiring to violate 18 U.S.C. §1951, which prohibits the obstruction of commerce by extortion, and 18 U.S.C. §1952, which prohibits travel in interstate or foreign commerce or utilization of any facility in such commerce to commit bribery, and of two substantive violations of the latter section. More intelligibly stated, the charge was that DeSapio conspired with Fried and others to bribe James Marcus, then Commissioner of the New York City Department of Water Supply, Gas and Electricity to withhold permits sought by Consolidated Edison Company of New York, Inc. (Con Ed) until Con Ed would agree to award construction contracts to Fried's companies. DeSapio was sentenced to a term of two years

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1 Corallo was given a 4½ year prison sentence, the term to run concurrently with the three-year sentence imposed on a previous conviction which was sustained in *United States* v. *Corallo*, 413 F.2d 1306 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969).

imprisonment on each count concurrently and to fines of $1,500 on each of the three counts.

I.

A summary of the evidence is needed to understand DeSapio's legal contentions. In the interest of keeping this opinion to manageable size, we shall endeavor to limit ourselves to the essentials, although in doing so we necessarily omit much evidence which one side or the other would doubtless deem significant.

The story constitutes a second act in the drama involving Commissioner Marcus and Herbert Itkin, who combined the roles of underworld character and FBI informer, of which *United States* v. *Corallo, supra,* 413 F.2d 1306, was the first. The evidence in that case depicted how Marcus, hard-pressed by loan sharks, had agreed with Corallo, Itkin, and Daniel Motto to award a contract for the renovation of a reservoir in Jerome Park in the Bronx to a construction company headed by Fried without competitive bidding, in return for Fried's promise to kick back 5% of the price. This success led Corallo, Marcus, and Itkin to agree that similar arrangements should be placed in operation elsewhere. Corallo mentioned that Con Ed was a prime target since it was constantly making contracts and also was requiring permits from the Water Department to dig in city streets. Not long after this, but in ignorance of what had been planned, Con Ed requested Water Department approval of a project to reconstruct and enlarge a power transmission facility known as the "high line," 20 miles of which ran atop the Catskill Aqueduct on a City owned right-of-way in Westchester County.

The first approach to Con Ed was made by Milton Lipkins, vice president of Broadway Maintenance Corpo-

ration. At a luncheon he asked Max Ulrich, Con Ed's vice president for public relations, about the company's "relationships" with the Water Department. After saying they were "reasonable," Ulrich indicated two major projects in the offing that would require Water Department approval—the "high line" and a pump storage hydroelectric facility at Storm King Mountain near the Catskill Aqueduct. Lipkins said he had heard the company's relations with the Department were very bad and that, through his friends "who were close to the Department," these relations would be improved if Con Ed would award some 5% to 10% of its business to the Orlando Construction Company, headed by Edward Orlando. Lipkins gave Itkin a somewhat rosy version of his success at the conference. Itkin relayed the good news to Marcus and Corallo, who suggested that if the prospective Storm King construction contracts, estimated at $100,000,000, were awarded to certain construction concerns, the three might share 40-50% of the profits. There is no contention that DeSapio played any role in these preliminaries.

Late in June or early in July, Fried, who had learned of the démarche with Con Ed and was distressed at the prospect of being excluded from the business, asked Marcus to meet him, and Marcus requested Itkin to come along. After some small talk, in the course of which Marcus told Fried to speak to Itkin as if to himself and Fried invited Marcus and Itkin to the forthcoming opening of his multimillion dollar horsefarm in Germantown, N. Y., Marcus left. Fried then asked Itkin why he and Marcus were "fooling around" with little companies like Orlando, boasted of his ability to raise $250,000 for pay-offs on 24 hours notice, and claimed to have the chairman of the New York County Republican party, and DeSapio, past chairman of

the New York County Democratic party, on his payroll. Itkin did not immediately take up the lead; instead Lipkins pursued Ulrich, without success.

Early in August, Edward Orlando, who had decided to accept Fried as a "partner" on Con Ed contracts, met with him and Itkin. According to Itkin, Fried again deprecated the Lipkins-Ulrich gambit and said, "[i]f you want to deal, come up to my farm, and I will introduce you to Carmine DeSapio and then you will be really working it right." Fried recommended a route through New Jersey and accommodations in a nearby hotel. At a meeting in Itkin's apartment on August 15, Corallo expressed to Marcus and Itkin his dissatisfaction with Lipkins' lack of progress.

The opening of the horsefarm on August 20 was attended by approximately a thousand guests. Itkin, who had used the recommended route and hotel, arrived between 1 P.M. and 2 P.M. According to him, while he was sitting with Orlando early in the afternoon, Fried came up to his table and led him off to be introduced to DeSapio. Fried said he had spoken to each man separately and, if they could work together, he would do his end. DeSapio allegedly said Itkin had been handling himself poorly and offered to help if Itkin would agree to work with no one else. Itkin accepted and was sure that Marcus would also; DeSapio gave Itkin his unlisted office telephone number. In his testimony DeSapio admitted that he knew Fried well and attended the opening in the company of Frank G. Rosetti, leader of the New York County Democratic party, and their wives. He claimed that Itkin came up alone, introduced himself as a friend of Marcus, and asked what DeSapio thought of Mayor Lindsay's administration. On two later occasions during the afternoon Itkin gave the DeSapio-Rosetti party lifts to and from the clubhouse.

DeSapio did not see Fried except at the clubhouse toward the end of the day.[2]

Soon thereafter Itkin told Marcus that DeSapio had called and would "handle" the Con Ed negotiations. Later in the month Itkin asked Marcus if he knew about the high line; Marcus inquired of his engineers and learned about it for the first time.

Itkin claimed to have met DeSapio on September 6 at the coffee shop in the Biltmore Hotel. DeSapio reiterated his poor opinion of Itkin's and Marcus' tactics and warned Itkin to stay in constant touch with him since he had been getting "insurance contracts" with Con Ed for years.[3] He said the Storm King project was too big for a starter and that the conspirators should use the high line to teach Con Ed the necessity of dealing through them. DeSapio denied this meeting.

On the same day Con Ed's vice president and chief engineer, Duncan, called upon Marcus with respect to the delay since May 9 in approving the high line project. Reviewing Con Ed's request, Marcus indicated there was no problem so far as he was concerned, although he would need added technical data, and instructed Groopman, the Department's chief engineer, to prepare a letter to that effect. Itkin testified that, on his relaying this news, DeSapio was indignant since "[i]t is much too early for me to make a move to impress upon them [Con Ed] they have to come to me" and instructed that the letter be held

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2 Rosetti corroborated most of DeSapio's account but had not witnessed the initial encounter with Itkin.

3 The Government contends that the quoted phrase was a code used by DeSapio to describe illegal projects. Although DeSapio had been employed for 10 years by an insurance broker, J. B. Rappaport and Co., this agency, according to DeSapio's testimony, had written no insurance for Con Ed.

up. On learning this, Marcus took Groopman's draft letter to the office of the Corporation Counsel, hoping thereby to obtain the desired delay. Instead of pondering about the letter which, even as drafted by Groopman, was merely a consent in principle subject to approval of engineering details and a caveat that Con Ed's contract to use the right of way would have to be renegotiated with the Board of Estimate, Assistant Corporation Counsel Redlich immediately prepared an insert making clear that Con Ed was not to incur any expense in reliance upon the approval in principle until the Department notified the company that the construction would not harm the Catskill Aqueduct. Marcus decided not to send the letter but rather to hold back for a while and then refer the matter to the Director of the Bureau of Franchises for renegotiation of the fee.

A fortnight later Luce, the new chairman of the board of Con Ed, paid his first official visit to Mayor Lindsay, at Gracie Mansion, encountered Marcus there, and pressed for approval of the high line project. Marcus went back to his office and had the Groopman-Redlich draft typed but did not send it. Itkin testified that the next day he met again with DeSapio at the Biltmore dining room.[4] DeSapio objected again to Marcus' being too compliant. Itkin related the financial pressures on Marcus; DeSapio responded that Marcus should be patient and firm, and that $25,000 would be coming from the high line "for us." He also suggested that in telephoning he would refer to

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4 Itkin testified that on the preceding day he had met with Fried and Orlando, that Fried knew of the meeting with DeSapio which had been set for the following day, and advised Itkin to "do what he says," and that Fried also gave assurance that he and Orlando "are doing our side with Con Ed."

himself as "Mr. Carl" while Itkin should call himself "Mr. Herbert."[5] DeSapio denied this meeting.

Itkin emphasized to Marcus that he must hold back on the letter and would receive $10,000 when the right time came. This would be signalled by Itkin's telling Marcus to "send the letter to my niece Plumps in England."

After a telephone call from Luce pressing for the letter, Marcus referred the matter to the Bureau of Franchises, for renegotiation of the fee, the procedure Marcus had earlier contemplated, but not acted upon, in his efforts to delay sending out the letter. He prepared a letter advising Con Ed of this but Itkin told him not to send it. Itkin claimed to have met DeSapio again at the Biltmore on September 29, and said that Marcus was now willing to return telephone calls made by Ebel, Luce's predecessor as chairman of the board of Con Ed and now chairman of the executive committee. DeSapio instructed Marcus to do this at an appointed date and time, October 9 at 11 A.M.; DeSapio would notify Con Ed of this in advance through Fried. It was also agreed that Itkin and DeSapio would split the $15,000 of the anticipated $25,000 payment remaining after Marcus' $10,000. DeSapio admitted having once met Itkin near the Biltmore coffee shop in October. He said that Itkin had proposed only that they should use their contacts to get something done about housing mortgage insurance.[6]

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5 Itkin's secretary testified to frequent calls between September and December 1967, from a woman who said Mr. DeSapio or Mr. Carl was calling. DeSapio denied ever using the pseudonym "Mr. Carl."

6 DeSapio and his secretary accounted for Itkin's finding him at the Biltmore coffee shop on the basis that Itkin had called his unlisted number and the secretary had indicated that he would be there. On the other hand, when interviewed by the New York County District Attorney's office, DeSapio made a statement which, as we read it, said

Marcus telephoned Ebel as arranged and saw him the next day. According to a report by Itkin to Marcus and Corallo at a meeting on October 11 which Itkin recorded, Ebel had emerged with the belief that the permit would soon issue; Itkin urged that Marcus disabuse him of this by professing outrage at a Con Ed advertisement disclosing that the high line would provide a nine-fold increase in power capacity, a circumstance which, more than ever, would entail a larger fee for the City. Marcus and Itkin testified that Itkin told Corallo at this meeting that De Sapio was to be the new intermediary with Con Ed. Defense counsel argues that the tape recording does not bear this out, and that the references to DeSapio concerned proposed "public relations" contracts with Brooklyn Union Gas Co., alleged by Itkin to have been discussed at the September 29 meeting with DeSapio. Although the tape is subject to more than one interpretation, the references to DeSapio's role with Con Ed are surely not so clear as Itkin's and Marcus' testimony about them.

Itkin testified he then told DeSapio that Marcus would again call Ebel, and DeSapio insisted on knowing the exact day and time. A telephone call from Itkin in New York to Marcus at his house at Beach Haven, N. J., fixed this, and Itkin relayed the information to DeSapio. DeSapio denied all of this.

We turn now to testimony by Con Ed's former vice president in charge of construction, Gerald Hadden, who testified under a grant of immunity. He had lunched on November 3 with Fried, from whom he had received cash gratuities since he had succeeded to the responsibility of

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he had called his secretary to find his messages and instructed her to inform three or four people, including Itkin, that he would be in the Biltmore cocktail lounge.

preparing the list of contractors permitted to bid on Con Ed construction jobs. Fried told of having heard that Con Ed was having difficulty with the City about the high line, which Hadden confirmed, and thought he could be of some help.

Max Ulrich testified that a week later Sidney Baron, head of a public relations firm with a consulting contract with Con Ed and a long-time friend of DeSapio, invited Ulrich to lunch and asked him to break an engagement to that end.[7] DeSapio was with Baron, who professed knowledge of Con Ed's problems, expressed doubt that Lipkins could assist, but thought DeSapio might be of help in view of his "knowledge and experience in governmental affairs." DeSapio expressed concern that the relations between two such vital organizations as the Department of Water Supply and Con Ed "were not particularly good" and thought he might be able "to act, perhaps, as some sort of a referee . . ." DeSapio admitted that he was present at the lunch and that Con Ed's problems with the Water Department were discussed, but denied that he had offered to assist.

We now return to Hadden. At another lunch, on November 17, Fried said he might have some friends who could help with the high line problem. Three days later DeSapio joined Hadden and Fried at lunch, asked Hadden to explain the permit problem, and said that maybe he could help. DeSapio's version was that he had come into the restaurant, which was across the street from his office, to look for his employer; that he had greeted Fried who introduced him to Hadden; but that there was no conversation.

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7 The other party to the engagement confirmed that this had been done.

Itkin testified that on the same day he spoke to DeSapio on the phone, and DeSapio said, "You can send that insurance policy out," see fn. 3. On November 21 Itkin gave Marcus the prearranged signal, but Marcus did not immediately respond. Hadden testified that on November 22 DeSapio again lunched with him and Fried, asked what Con Ed needed, and inquired whether a letter would do. In his testimony DeSapio insisted there had been only one encounter with Fried and Hadden, which was of the innocent sort described above.

According to Itkin, DeSapio telephoned him later that day in anger because no letter had been delivered. Itkin called Marcus, who had the non-committal letter taken to Luce late that afternoon. Itkin then went to DeSapio's office for the promised payment. DeSapio complained that the letter had been delivered to the wrong person. He called Fried, who advised holding Itkin and Marcus off. DeSapio demurred and told Itkin to come to his apartment two days later[8] when "I will have some of the money even if I have to lay it out in advance until I get it back from . . . Fried." DeSapio denied that any such conversation had occurred.

Itkin claimed that he went to DeSapio's apartment as arranged. DeSapio said he had heard the letter was "weak" but was advancing $5,000. Itkin assured him that Marcus would cure any deficiencies. Hadden testified that on the same day, November 24, Fried telephoned him and indicated that the letter had been despatched. When Fried called again on November 27, Hadden said the letter was worthless and sent Fried a copy.

Itkin asserted that on November 29 DeSapio gave him an additional $2,500 but would advance no more until Fried

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8 The intervening day was Thanksgiving.

reimbursed him. However, on December 4 he paid another $5,000.[9] DeSapio said that Fried had paid him only partially, that Fried had decided to pay only $20,000 since the letter was so weak, but that he would not reduce his $7,500 share. When Itkin protested, DeSapio said "it is only the beginning with us." DeSapio denied all of this, as well as the meeting described in the preceding paragraph.

Hadden recounted a third lunch with DeSapio and Fried on December 5. He repeated that the letter was worthless. DeSapio said "these people" were "hungry for money." Hadden thought nothing should be paid since the letter was not a permit, but Fried insisted he would still pay $20,000. DeSapio denied being present at any such meeting.

On December 12 Marcus resigned as Commissioner. Hadden invited Fried to lunch the next day and expressed concern. Fried told him not to worry although Fried said he had paid the $20,000, and gave Hadden $5,000 as a "Christmas present." Fried, Marcus, Itkin and Corallo were indicted on December 18 by a federal grand jury with respect to the Bronx reservoir contract.

It remains only to recount a final episode. On Friday, January 5, 1968, W. Donham Crawford, Con Ed's vice president for purchasing, summoned Fried to his office. Fried was informed he had been dropped from the list of contractors authorized to bid for Con Ed projects. After unsuccessful protests that such action was unjustified because he should be presumed innocent of the charges against him, Fried "out of the clear blue sky" declared "Well, you know $20,000 has been provided to Mr. Marcus and that

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9 This included two $2,000 packets of cash in wrappers of the Bank of North America. There was evidence permitting a conclusion that these, which were received in evidence, and their contents had come from Fried.

there was a luncheon at which this matter was discussed and present were CD [to wit, DeSapio] and JH [to wit, Hadden]." Fried added that "this was for the transmission line in Westchester." Crawford reported this to Luce, who informed Hadden, who in turn sent for Fried. The following Monday, January 8, Fried made another visit to Con Ed's offices. He stated to Hadden, and later repeated in Crawford's presence, "You are not involved in this at all." He added that he wanted to see Luce. Hadden was called away. After telling Crawford there was going to be a full exposé of the high line affair, Fried explained that in fact Hadden was involved, and that Duncan and Ulrich knew about the matter. He added that "DeSapio has to be made whole" and "I can take care of that." He renewed his insistence on seeing Luce or some other high Con Ed official to plead for restoration to the bidding list. His request was not granted.

Although counsel for DeSapio points to many weaknesses in the Government's case, notably Marcus' inability either to aid or to obstruct the high line project once he had placed the issue in the Bureau of Franchises, the worthlessness of the letter that produced the alleged payments, and the unlikelihood that Fried would make or authorize a kick-back with no assurance that Con Ed would depart from its competitive bidding procedures, he does not and could not properly contend that the evidence was insufficient for submission to the jury. His argument rather is that the case was a close one and that, in consequence, errors that might be regarded as non-prejudicial in an open-and-shut trial would be grounds for reversal here. We will consider the appeal on that basis.

II.

DeSapio's first point concerns the denial of his motion for a trial separate from Corallo's. There is and could be no claim that joinder was improper under F. R. Cr. P. 8(b); the contention is rather that the joint trial so prejudiced him as to render the refusal to grant a severance under F. R. Cr. P. 14 an abuse of discretion. As to this the Fifth Circuit has recently observed, *Tillman* v. *United States*, 406 F.2d 930, 935, *vacated as to one defendant on other grounds*, 395 U.S. 830 (1969):

> The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review, 8 Moore, Federal Practice ¶14.02 [1], p. 14-3 (2d ed. 1968). The defendant must show something more than the fact that "a separate trial might offer him a better chance of acquittal." Id. at ¶14.104[1], pp. 14-14–14-15.

DeSapio's claim of prejudicial misjoinder must be appraised in light of the evidence and the positions of the parties. The proof left little doubt that Marcus, Itkin, and Fried were members of a conspiracy in which Marcus—by withholding or delaying the issuance of permits—would induce Con Ed to award construction contracts to Fried who would make payments to Marcus and Itkin in return. DeSapio did not deny the existence of such a conspiracy; he insisted that he had no part in it and that his participation had been invented by Itkin to increase Itkin's own stature with the FBI and other prosecutorial agencies. Corallo likewise did not dispute such a conspiracy; he claimed that he had not been allowed to participate or that, to such extent as he had been, this was simply a continua-

tion of the Bronx Reservoir conspiracy, in which, as the judge made crystal clear to the jury, it was plain DeSapio was not involved. There was no evidence, and no suggestion, that Corallo and DeSapio ever met or spoke to each other.

Mere statement of these facts sufficiently disposes of most of DeSapio's arguments on this score. Proof of the Bronx Reservoir conspiracy showed that Marcus, Itkin, Corallo and Fried had previously worked out kick-back agreements and thus was relevant to prove they could well have been continuing along the same line. But it had not the slightest tendency to prove DeSapio's participation in the Con Ed conspiracy, and it is no abuse of discretion to deny a severance merely because of the remote possibility that the jury might draw so irrational an inference. The same comment applies to references to other kickbacks mentioned in the recording of the October 11 meeting of Marcus, Itkin and Corallo. It is similarly unrealistic to suppose that pre-trial publicity and evidence showing Corallo to have been an underworld character could have "rubbed off" on DeSapio when there was no claim that he had ever had anything to do with Corallo. Such contentions take insufficient account of the intelligence and conscientiousness of the jury, the effective efforts of the judge to keep it on the beam, the skill of defense counsel, and the requirement under F. R. Cr. P. 14 that the defendant demonstrate substantial prejudice from a joint trial, not simply "a better chance of acquittal" at a separate one, *Tillman* v. *United States, supra;* 8 Moore, Federal Practice ¶14.04[1], pp. 14-14–14-19 (1970 ed.).

The only point deserving further comment under this heading is the claim that statements of Corallo's counsel, particularly in summation, in effect conceded the bulk of the Government's case. Although some of the passages quoted

in appellant's brief are taken out of context, we can still understand how "exasperating," to use Judge Medina's apt adjective, *United States* v. *Kelly*, 349 F.2d 720, 766 (2 Cir. 1965), *cert. denied*, 384 U.S. 947 (1966), the gushing summation for Corallo must have been to counsel who was making a tight defense on DeSapio's behalf. But here again counsel underestimates the jury's awareness of its responsibility to appraise the credibility of the witnesses and the immateriality of what Corallo's lawyer thought about portions of the Government's case, particularly in light of the court's admonition that "the lawyers . . . have no right to make any determinations of credibility of witnesses" and that their "comments were argument only."

III.

We next consider a variety of claims having the ambiguous role of Itkin as their common theme.

In *United States* v. *Corallo, supra*, 413 F.2d at 1320-22, the court was not required to reach similar contentions since it found no sufficient contradiction to Itkin's testimony "that whatever else he might have been doing with the FBI to uncover the machinations of the underworld, he was in this venture entirely on his own and acting wholly without the knowledge of the FBI until he found it to his interest to tell the FBI, after the last installment of the bribe had been paid." The record in this case would not support so broad a finding. At least from mid-summer of 1967 Itkin kept the FBI informed of the conspiracy's progress.[10]

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10 For example, Itkin gave his "contact" in the FBI, Agent Vericker, advance notice of his meeting with Marcus, and Corallo on August 15 and turned over the tape recording of it. The same occurred with respect to the October 11 meeting. In the interval he had been in touch with the FBI two or three times weekly. During the critical period leading up to and embracing his receipt of payoffs from DeSapio

Itkin testified on cross-examination that it was always his intention to turn over to the FBI information on deals that had been completed, that he would have pursued the larger Storm King projects on the same basis if that had proved possible, and that his "primary motive was never to make the money." On the other hand, the FBI never told him what to do. While he was "infiltrating, . . . picking and choosing as it came," the Con Ed venture was his own activity and he "was very definitely a participant." Vericker admitted the FBI knew that Itkin "had obtained illegal money" but denied that it had directed or authorized Itkin to participate in the Con Ed scheme and defended its failure to take earlier action on the ground that Itkin "was giving us a tremendous amount of information on labor racketeers, on hoodlums, and we did have this evaluation problem."

On the basis of these facts, DeSapio asks that, in the exercise of our supervisory power, and also as a matter of due process, we reverse the conviction because, as said in Chief Justice Warren's solitary dissent in *Hoffa* v. *United States*, 385 U.S. 293, 315 (1966), "the nature of the official practices evidenced here is offensive to the fair administration of justice in federal courts." The FBI's conduct indeed went far beyond the familiar cases of the revenue agent approached with a corrupt proposal who, after reporting it to his superiors and on their instructions, acts out the drama which is closely surveilled and often wired for sound, cf. *Lopez* v. *United States*, 373 U.S. 427 (1963); or of the narcotics agent who plays an equivalent role in a pusher's home, cf. *Lewis* v. *United States*, 385 U.S. 206 (1966). In

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in November 1967, Itkin made six contacts with Vericker. In addition, he turned over the two bank wrappers allegedly received from DeSapio on December 4—but not the $4,000 they contained.

such instances, while the government agent participates in a transaction having the elements of a crime, it is one without adverse social consequences; there is no intention that the revenue agent will keep the bribe or that the narcotics agent will sell the narcotics. Here the FBI sat by while people extorted money to induce official action, with knowledge that they planned to keep it for their own use. To be weighed against this, however, is the value of the information supplied by Itkin, revealing an extensive picture of corruption in high places, both in city government and in business, which had not theretofore been detected and very likely could not have been exposed in any other way. The difficulties courts have had in explicating and marking the boundaries of the defense of entrapment,[11] see *Sorrells* v. *United States*, 287 U.S. 435 (1932), *Sherman* v. *United States*, 356 U.S. 369 (1958), and the material in Hall, Kamisar, LaFave and Israel, Modern Criminal Procedure 421-38 (1969), suggest the inadvisability of attempting to develop a penumbral doctrine that would add to the many collateral issues now pervading criminal trials still another, a judicial determination whether the activities of an informer had passed some ill-defined acceptable bounds. Where, as here, there is no claim that the informer's activity infringed any specific of the Bill of Rights or any statute of the United States relating to the conduct of investigations, and the competing considerations are such that we are unable to conclude that it violates the "decencies of civilized conduct," *Rochin* v. *California*, 342 U.S. 165, 173 (1952), such decisions had best be left to the executive branch, which is accountable for its conduct to Congress.

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11 No claim is made on that score. The Government's case was that DeSapio was brought into the conspiracy by Fried and was a willing participant; DeSapio's case was that he never participated at all.

A second string on the Itkin bow is that if he was not a genuine member of the conspiracy, much testimony was wrongly received. DeSapio concedes, as he must, that, whether conspirator or not, Itkin could testify to anything that he knew the conspirators did or that DeSapio said in his presence. On the other hand, Marcus' testimony concerning narrations by Itkin would have had to be excluded unless Itkin was a member of the conspiracy. It is contended also that if Itkin was not a conspirator, the jurisdictional basis for the two substantive accounts would disappear since these were based on Itkin's travel through New Jersey to Fried's horsefarm and his telephoning Marcus in that state.

The evidence we have summarized warranted a conclusion that Itkin was participating in the conspiracy, even though he was currently reporting developments to the FBI and doubtless did not expect to be prosecuted. Whatever Itkin's motives may have been, and one can infer from the evidence that they were not always entirely consistent, the record clearly supports the finding that Itkin, on his own initiative, entered into an illicit agreement with Fried, Marcus, and others to carry out the high line venture. The contention that Itkin's disavowal of personal monetary benefit was inconsistent with his conspiratorial objective is sufficiently answered by our recent holding in *United States* v. *Peltz*, —— F.2d ——, —— (1970), slip opinions, 97, 102, that one can be a member of a conspiracy without seeking financial gain from the enterprise—however rare such a conspirator may be. Moreover, Itkin's having received and apparently kept some of the proceeds of the conspiracy casts doubt on his eleemosynary intentions; what he apparently meant by this testimony was that after paying for lunches and the like—his necessary "business" expenses—he had little left for himself.

The judge would thus have been justified in making an independent determination that Itkin was a conspirator and that his narrations were therefore admissible, *United States* v. *Geaney*, 417 F.2d 1116, 1119-20 (2 Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Instead, after summarizing the testimony, he told the jury that if they believed Itkin and Vericker, they should deem Itkin to have been a conspirator, whereas if they did not and determined "that the FBI specifically instructed or authorized Itkin to participate in the Con Edison scheme from the very beginning, then you could determine that Itkin was not a conspirator as contemplated by the law." He also instructed that if the jury determined that Itkin, as an agent of the Government, contrived to travel to Fried's farm via New Jersey and to call Marcus in that state for the sole purpose of conferring jurisdiction on the federal courts, they should acquit on the substantive counts.

Although counsel now criticizes these instructions as too limited, he did not do so when the judge invited an expression of disagreement, but excepted only to the court's refusal to instruct that Itkin was not a conspirator as a matter of law.[12] The defense was not entitled to such an instruction.

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12 This was the position reflected in Request No. 1 to charge. Counsel's statement must be taken as waiving the more moderate alternative reflected in Request No. 2. Similarly counsel's failure to except to the instruction with respect to travel constituted an abandonment of any point with respect to the difference between the instruction as given and Request No. 3. See *Armstrong* v. *United States*, 228 F.2d 764, 768 (8 Cir.), *cert. denied*, 351 U.S. 918 (1956); *Johnson* v. *United States*, 291 F.2d 150, 156 (8 Cir.), *cert. denied*, 368 U.S. 880 (1961). Cf. *United States for the use and benefit of D'Agostino Excavators, Inc.* v. *Heyward-Robinson Co.*, —— F.2d ——; —— (2 Cir. 1970), 1969 Term slip opinions, 3985, 3997-98.

IV.

DeSapio challenges the admissibility of several damaging statements made by Fried to Hadden on December 13, 1967 and to Crawford on January 5 and 8, 1968. His contention is that upon Marcus' resignation and indictment, the conspiracy ground to an abrupt halt since the conspirators could no longer utilize Marcus' office as a means of inducing Con Ed to award construction contracts to Fried; any declarations after that time, it is argued, could not be in furtherance of the conspiracy and were therefore improperly received. We do not question that if there were error in receiving Fried's statements, this would be sufficiently serious to require reversal, since these constituted the only testimonial support for Itkin's story of payments by DeSapio. We do not think there was.

The Government say that the argument here under consideration takes too narrow a view of the conspiracy. The indictment named as one objective that, as a result of informing Con Ed of Marcus' intention to misuse the powers of his office for his own benefit and to the detriment of Con Ed, Con Ed "would enter into contracts with the defendant HENRY FRIED that companies owned, controlled and designated" by him and that such "companies would pay him money in the form of dividends, salary and commissions." The prosecution argues that while Marcus' resignation and indictment indeed prevented any further use of his position for extortion on new Con Ed applications, it did not prevent the conspirators from endeavoring to secure what all along had been the only object of interest to Fried.

If the Government's argument depended on showing that Fried entertained any belief, at least on January 5 and 8, 1968, that he could obtain the high line contract from

Con Ed without competitive bidding, we should have to reject it. Fried was far too sophisticated to believe that the new Con Ed management would expose itself to suspicion, or worse, by departing from established bidding procedures in favor of a man just indicted for having given a kickback to the former Water Commissioner. Beyond that, counsel's cross-examination of Crawford made it clear that Fried's objective on January 5 and 8 was simply to be restored to the competitive bidding list.

We see no reason, however, why so much should be required. From the time of DeSapio's alleged entrance into the conspiracy at Fried's instance, it was contemplated that the money to be paid to Marcus, Itkin and himself would come from Fried, who would find his compensation in contracts with Con Ed. After DeSapio had advanced money, it was surely an important objective for him to receive repayment as well as his own promised share, and Fried remained the only source. While Fried might have decided to provide this in any event, and indeed once said he had done so, he chose to pursue the possibility that he might maintain profitable relationships with Con Ed by remaining on the bidding list and thereby make both himself and DeSapio "whole." That he believed his relations with Hadden and DeSapio's influence still carried some weight in attaining this more limited objective is apparent from the record. Since there is no evidence that DeSapio had withdrawn from the conspiracy at this time, he must be deemed to have authorized Fried to put this forward. Cf. *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1946). A conspirator who has laid out money in the expectation of reimbursement from another member takes the risk that the latter may make imprudent disclosures in endeavoring to obtain the wherewithal. Such

declarations are no less in furtherance of the conspiracy because the prospects of success may now appear dim, the objectives of the conspiracy had become more limited and the hoped repetition of the conspiratorial endeavor was impossible.

We recognize, of course, that actions do not become acts in furtherance of a conspiracy *merely* because a conspirator is seeking a means of meeting the financial obligations he incurred therein, for example, if Fried had been removed from the bidding list of some other company not an objective of the conspiracy and had protested that he must be left on the list since he needed the wherewithal to make DeSapio whole. Here, by contrast, Fried was employing means contemplated by the original agreement—the use of his own and DeSapio's influence with Con Ed to achieve ends within the scope of the venture. This case is thus unlike *Krulewitch* v. *United States*, 336 U.S. 440 (1949) or *Grunewald* v. *United States*, 353 U.S. 391 (1957), which involved alleged continuing or subsidiary conspiracies "to conceal facts in order to prevent detection, conviction and punishment." 336 U.S. at 443. Rather than attempting to cover his tracks, Fried was making affirmative efforts to salvage what was left in the enterprise.

V.

DeSapio's other challenges to the conduct of the trial require much less comment. One of these concerns an interview by an Assistant District Attorney of New York County. DeSapio had been fully warned of his rights; indeed he was asked to bring a lawyer with him but declined. The complaint is that the interview was recorded and the recording gave rise to the contradiction noted in fn. 6. So long as *Lopez* v. *United States*, 373 U.S. 427, 439 (1963), remains the law, the claim is frivolous.

Counsel complains that "much of the cross-examination of DeSapio was acutely concerned with how DeSapio, in fact, makes a living and revealed the Government's preoccupation with depicting him as a back-office fixer and influence peddler having no professional training or skills to speak of except the resources of powerful friendships." If it was, this was permissible in light of DeSapio's description of himself as a legitimate employee of an insurance broker and his denial of Itkin's testimony that he had boasted of having obtained "insurance contracts," see fn. 3, from Con Ed for many years and having "almost everything boxed in in the City" along with his Republican counterpart. The only item where the prosecution would have overstepped the bounds was what, despite contrary protestations, we must regard as an attempt to put before the jury a well-publicized incident in which newspapers reported during 1957 that DeSapio had left a paper bag containing $11,000 in cash in a taxicab. However, the prompt objection of defense counsel aborted the inquiry before it could assume offensive form and the judge promptly struck out not only what there was of the question but also its predecessor, and instructed the prosecutor to start again.

While the prosecutor's summation was vigorous, it did not exceed the limits of fair argument, see *United States* v. *DeAlesandro*, 361 F.2d 694, 697 (2 Cir.), *cert. denied*, 385 U.S. 842 (1966), particularly in light of the emotional summation by defense counsel, and, save on several unimportant occasions, was not made the subject of objection. We have examined the materials which the trial court declined to make available to the defense under 18 U.S.C. §3500, and find no error in that ruling. Other trial errors claimed by DeSapio have been considered but do not merit discussion.

VI.

We come finally to the denial of DeSapio's motion for a new trial. Here some further facts must first be stated.

Near the end of its case, the defense called as a witness Harold Daniels, a brother-in-law of Henry Fried. Daniels testified that on August 20, the day of the opening of the horsefarm, he saw Fried at the clubhouse around 1:30 P.M.; that Fried was suffering from an attack of gout and couldn't walk; that he took Fried in his car to a parked school bus, holding forty to forty-five people, which Fried entered; that Fried asked him also to join the bus tours because Fried was physically unable to get in and out to show points of interest to the guests; that the bus made two such tours; that Fried was continuously on the bus until the completion of the second tour around 5:30 P.M., when Fried, who was carrying a cane, went to the clubhouse where the dedication ceremonies were held; and that Daniels did not see DeSapio until such ceremonies a few minutes later.

If this testimony was believed, it would have shattered Itkin's account of his meeting with Fried at the horsefarm and also of Fried's having related an earlier meeting there with DeSapio, and would have confirmed DeSapio's testimony that he did not see Fried except at the clubhouse toward the end of the day. With the taking of testimony scheduled to close on the following day, the Government was forced to act with more than deliberate speed. Using the horsefarm guest-book as its source, it obtained four witnesses whom it offered in rebuttal.

Mrs. Gordon Auchincloss testified she saw Fried near the swimming pool on the farm around 2 P.M. and again about an hour thereafter, and thought she had seen him in a tent still later. She was "not conscious" of his using a

cane. Monsignor Kane said that, after arriving at the farm around 3 P.M., he met Daniels and visited the latter's mansion nearby. Later he was introduced to Henry Fried at the race track. Ulrich testified that when he arrived at the farm about 2 P.M., Henry Fried was standing at the entrance greeting the arrivals. When Ulrich saw him in the same general location about an hour later and went over to thank him for the invitation, Fried suggested that they look at the indoor track, to which Ulrich drove him, and also at his new home, where Fried conducted a 15 minute tour. Finally Sister Ann James, a student nurse at the Carmelite Sisters Home for the Aged and Infirm, testified that "Mr. Fried" had walked over to the swimming pool around 2:30 P.M., and that she did not believe he was on the bus she entered for a tour around 3 P.M. She had previously met Henry Fried, "but not personally," when he visited the Home.

The motion for a new trial was predicated on an attack upon the testimony of two of the four witnesses. At a hearing on the motion conducted by the district judge, Monsignor Flanagan, who had attended the opening along with Monsignor Kane, placed their visit to the Daniels mansion at five o'clock as opposed to Kane's version of shortly after three. More important, it turned out that Sister Ann James' testimony was founded on a serious mistake. On returning to the Home from the courthouse, she had looked for a photograph that had been taken while she was on the farm with "Mr. Fried." She found this was Richard Fried; he looked nothing like his brother Henry, who had indeed visited the Carmelite Home. She immediately communicated this to the lawyer for the order, John J. Kelly, who had accompanied her to court that morning. He did not advise the court or counsel about this

serious error until after the verdict, and then only as a result of an investigation initiated by defense counsel. At the post-trial hearing the Government bolstered its case with testimony by two new witnesses whom it had located in the interval. Richard Staats, the driver of the bus, testified that neither Henry Fried nor Daniels was on it at any time, that Henry Fried was walking about the grounds without a cane, and that Fried came up to the bus and gave him a $10 tip at the end of the day. William Foster, a guest, who also testified that Henry Fried was walking around "meeting the people and talking to the people," identified motion picture photographs he had taken between 3 and 3:30 P.M. In one Daniels appears on the grounds *sans* Henry Fried, in another Henry Fried is standing with a group *sans* Daniels.[13] On the basis of this evidence the judge denied the motion for a new trial.

If the motion is viewed simply as one based on newly discovered evidence and free from any question of prosecutorial misconduct, the denial was well within the judge's discretion. This is so whether the applicable test is the formulation of *Berry* v. *State*, 10 Ga. 511, 527 (1851), namely, whether the new evidence "is so material that it would probably produce a different verdict, if the new trial were granted" or of *Larrison* v. *United States*, 24 F. 2d 82, 87 (7 Cir. 1928), namely, whether it might have produced a different verdict. See *United States* v. *Miller*, 411 F.2d 825, 830-31 (2 Cir. 1969), and the cases there cited.[14] While the newly discovered evidence indeed can-

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13 We have viewed the pictures in the presence of counsel. While we agree with appellant that Fried is not moving, he was standing on the grounds and no cane was visible.

14 The Government points out in brief that *Larrison* dealt with a situation where a principal prosecution witness had made an affidavit (later repudiated) that he had given false testimony *at the instance of Post*

celled out the evidence of Sister Ann James, it left the testimony of Mrs. Auchincloss and Ulrich unimpaired and simply created a contradiction with respect to Monsignor Kane's. However the matter might stand if that were all, the testimony of Staats and Foster and the motion picture film constituted such a devastating contradiction of Daniels' testimony that, as the Government suggests, it seems exceedingly doubtful that skilled counsel would even use that in a new trial.[15] Beyond all this, it defies belief that, with a thousand people in attendance at the horsefarm, whose names were available, the defense could find no one but Henry Fried's brother-in-law to testify that Fried was afflicted with gout, was consequently unable to greet his guests, and had to spend most of the afternoon in a bus—if such were the facts.

Appellant contends we should apply the less severe test of probable effect which we follow in instances of prosecutorial misconduct. *United States* v. *Keogh*, 391 F.2d 138, 146-47 (1968); *United States* v. *Miller*, *supra*, 411 F.2d at 830-32; *United States* v. *Polisi*, 416 F.2d 573, 577-79 (1969). The items of alleged misconduct are:

(1) That, before testifying, Sister Ann James had been shown a group of four or five photographs including one of Henry Fried on which his name had appeared whereas the others bore no names;[16]

Office inspectors. This would account for the departure from the *Berry* test, which the opinion did not mention. In fact the *Larrison* court denied a new trial. We are inclined to agree that the less severe *Larrison* test should be confined to cases of prosecutorial misconduct.

15 Apparently Daniels has died but his testimony at the instant trial would, of course, be usable if the defense wished.

16 Something is also sought to be made of the fact that one photograph was of a woman. While this was a stupid mistake, it obviously was not directed to leading Sister Ann James to make a misidentification of Henry Fried.

(2) That the prosecution did not reveal to defense counsel that the photographs had been exhibited;

(3) That the prosecutor allegedly concealed that Sister Theresa,[17] who had accompanied Sister Ann James both to the horsefarm and to the courthouse, had been unable to identify the photograph of Henry Fried;

(4) That, as the defense would also have proved through Sister Theresa, Sister Ann James had expressed doubt to the prosecutor about her identification of the photograph which the prosecutor did not reveal; and

(5) That the prosecutor deliberately couched his questions to Sister Ann James in terms of "Mr. Fried," knowing that she was thinking of Richard rather than Henry.

We can speedily dispose of (2). While it might have been better practice for the prosecution to have put the defense on notice of the photographic identification, compare *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 913 & n. 1 (2 Cir. 1970), experienced counsel must surely have been aware of this possibility, and there is no reason to doubt that the court would have allowed a *voir dire* on this subject if request had been made. We can also quickly dispose of (5), on quite different grounds. If the prosecutor had deliberately indulged in any such tactic as the defense claims, this would warrant the most stringent condemnation and appropriate corrective action. But we see no evidence that he did. Sister Ann James had identified

17 The court did not allow the defense to call Sister Theresa at the post-trial hearing.

Henry Fried's photograph and, so far as the record shows, had said nothing about Richard. The criticism of the prosecutor thus depends on reading into his conduct at the trial knowledge he obtained only later.

The prosecution explains item (1) on the basis that its only available photograph of Henry Fried bore his name, that it endeavored to conceal this from Sister Ann James by arranging the photographs so that the name would be covered, but that there was an unintended slip-up. We find no misconduct in the showing of the photographs; with time running against it, the prosecution had to make do with what it had. It is a closer question whether the slip-up created a duty of disclosure that the mere showing of photographs would not. Here again it is necessary to avoid viewing the prosecutor's actions on the basis of hindsight and to make some allowance for the haste with which he was forced to act.

This leaves only items (3) and (4). Since in our view the court should have allowed Sister Theresa to testify, we will assume *arguendo* that she would have given evidence in accordance with counsel's offer of proof. This was not that Sister Theresa would assert that she had not seen the man whose photograph had been exhibited, but only "that she could not identify any of the pictures because of the length of time," over two years. While the defense might have liked to know this, we do not believe it was so significant that non-disclosure was a breach of the prosecutor's obligation, especially since the defense could easily have learned of Sister Theresa by asking Sister Ann James whether she was accompanied as Sisters usually are. This leaves only item (4). Viewing the matter with the benefit of hindsight, and assuming that the facts were as stated in the offer of proof, we are bound to say

it would have been better if the Assistant District Attorney had revealed Sister Ann James' uncertainty before or during her examination. Still this case is a long way not only from "a considered decision to suppress, taken for the very purpose of obstructing," and even from "a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention," *United States* v. *Keogh, supra,* 391 F.2d at 146-47. Sister Ann James was one of four witnesses called to contradict Daniels' story, even though very likely the most impressive. Revelation that she had not been absolutely sure of her identification of the photograph, although she was reasonably sure that the man she saw at the horsefarm was Henry Fried, who had admittedly visited the Home, would hardly have been of "high value to the defense." Here, as in the case of the interrogation about "Mr. Fried," the defense embroiders later developments into a sinister cloak over prosecutorial omissions "where hindsight discloses that the defense could have put the evidence to not insignificant use," *United States* v. *Keogh, supra,* 391 F.2d at 147. As already noted, the prosecutor's conduct must also be considered in light of the defense stratagem of calling Daniels as one of its last witnesses and the consequent need for preparation of rebuttal testimony after the trial recessed that afternoon and before it began the next morning. Prosecutors under such stress cannot properly be held to standards quite as exacting as those that may be appropriate when they have had days or even weeks to consider whether a disclosure should be made. We thus do not find this to be a case where the defense is entitled to the benefit of "a fairly low showing of materiality," 391 F.2d at 148, of the newly discovered evidence.

On careful review of the entire record we are satisfied that Carmine DeSapio was accorded a fair trial conforming to law, and that the judge was warranted in refusing to direct a new one. The verdict must therefore stand.

Affirmed.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 492—September Term, 1971.
(Argued January 19, 1971 Decided February 25, 1972.)

Docket No. 71-2153

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE G. DE SAPIO,

Defendant-Appellant.

Before:

SMITH, FEINBERG and MULLIGAN,

Circuit Judges

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, *Judge,* denying appellant's second motion for a new trial based upon newly discovered evidence and alleged government suppression of evidence at trial or alternatively for an evidentiary hearing.

Affirmed.

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ROBERT G. MORVILLO, Assistant United States Attorney, New York, New York (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, James Schreiber, Ross Sandler, Peter F. Rient, Asst. United States Attorneys, of counsel), *for Appellee.*

MILTON S. GOULD, New York, New York (Shea Gould Climenko & Kramer, New York, N. Y., Henry J. Boitel, Miles F. McDonald, Bernard D. Fischman, of counsel), *for Defendant-Appellant.*

PAUL G. CHEVIGNY, New York, New York, Attorney, New York Civil Liberties Union, *Amicus Curiae.*

MULLIGAN, *Circuit Judge*:

Carmine G. De Sapio appeals from an order entered in the United States District Court for the Southern District of New York on December 13, 1971 by the Hon. Harold R. Tyler, United States District Judge, denying his second motion for a new trial based upon newly discovered evidence (Fed. R. Crim. P. 33) and the alleged suppression of evidence by the United States Government at trial or alternatively for an evidentiary hearing.

After a four-and-a-half week trial before Judge Tyler, the jury returned a guilty verdict against De Sapio on December 13, 1969. He was convicted of conspiracy to obstruct commerce through extortion and to travel interstate and to use interstate facilities to commit bribery (18 U.S.C. § 371) and of two substantive violations of 18 U.S.C. § 1952, unlawfully travelling interstate and using interstate telephone facilities to facilitate bribery. The jury found

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the motion for a new trial and the suggested alternative of an evidentiary hearing.

Much of that which is alleged to be new was unquestionably known or should have been known to De Sapio's counsel at the time of the trial; that which wasn't is merely impeaching or cumulative, and the proposition that it probably or even possibly might change the jury verdict is not tenable. The so-called new evidence sheds no further light on Itkin's relationship to the government which has already been fully explored and determined by this court in Chief Judge Friendly's careful analysis in his opinion affirming De Sapio's conviction and the denial of his first motion for a new trial. A reading of that opinion, *United States* v. *De Sapio, supra,* is necessary if this one is to be fully comprehended.

Herbert Itkin has been a voluble but valuable informant whose information has resulted in the indictment, trial and conviction of some leading criminals. He has been cross-examined by experts. Appellant's counsel has culled the thousands of pages of his testimony and has assembled a melange of material, none of which on scrutiny has any meaningful relationship to the question of De Sapio's guilt or innocence. In essence, what is sought here is the grand inquisition and examination after trial of Itkin, urged upon us as an American Titus Oates. Itkin is not on trial here—whether he is Benedict Arnold, Nathan Hale or perhaps Walter Mitty or a composite of all three might well be a fascinating undertaking. However, we are circumscribed by well established rules of appellate review which limit our task to the determination of whether there is newly discovered evidence that Herbert Itkin committed perjury in the trial of Carmine De Sapio, that he was a government agent and not a true conspirator and that the government suppressed evidence in that trial.

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that De Sapio had conspired with others to bribe James Marcus, then Commissioner of the New York City Department of Water Supply, Gas and Electricity, to withhold permits sought by Consolidated Edison Company of New York, Inc. until it had awarded construction contracts to another conspirator. De Sapio was sentenced to concurrent terms of two years imprisonment on each count and to fines of $1500 on each of the three counts. De Sapio's first motion for a new trial based upon newly discovered evidence was denied by Judge Tyler on February 10, 1970. On November 16, 1970 this court affirmed the judgment of conviction and the order denying the motion for a new trial. *United States* v. *De Sapio,* 435 F.2d 272 (2d Cir. 1970). Petitions for rehearing and rehearing *en banc* were denied on December 28, 1970. The Supreme Court denied certiorari on May 24, 1971, 402 U.S. 999 (1971).

The motion made below is based upon alleged newly discovered evidence that Herbert Itkin, a principal government witness in the De Sapio trial, is a self-confessed perjurer and suborner of perjury, that he is further an agent of the C.I.A. and the F.B.I. and hence not a true conspirator and finally that the government knew of his perjury, indeed abetted it, and then suppressed it at trial in violation of the appellant's constitutional rights under the fifth and sixth amendments of the Constitution. The newly discovered evidence consists primarily of the alleged perjurer's sworn testimony in federal, state and English proceedings which were conducted after or were available for examination after the appellant's trial and appeal. After oral argument and the submission of briefs, Judge Tyler rejected all of these contentions in his order and opinion of December 13, 1971. After a careful reading of the testimony and cross-examination of Itkin in this case and his subsequent testimony in other cases, we affirm the order denying

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I

The Newly Discovered Evidence

1) In April, 1970 Itkin was a government witness in a case, *United States* v. *McCarthy,* No. 68 Cr. 467 (S.D.N.Y. April, 1970) which involved labor racketeering and had nothing to do with the factual issues in the De Sapio case. On cross-examination, in an attack on Itkin's credibility, he admitted that he had been indicted in New York County for conspiracy to commit perjury. Defense counsel then made an offer of proof that two detectives from District Attorney Hogan's office in New York County had overheard a conversation between Itkin and Marcus in a restaurant in December, 1967 in which Itkin allegedly advised Marcus, who was about to go before a New York Grand Jury, to falsify his testimony as to the source of the money Marcus had used to pay certain debts. The offer of proof was rejected by Judge Tyler, who presided at that trial, without objection by defense counsel. Itkin's questioning was limited to the fact of his indictment. There is no claim by appellant of any suppression by the government of Itkin's alleged subornation.

2) In October, 1965 Itkin entered into an "agreement and declaration of trust" for the benefit of creditors. In it he declared and swore that the list was a true and accurate description of his creditors and the amounts owed to each. In trials subsequent to De Sapio's, *United States* v. *McCarthy, supra,* and *United States* v. *Lipkins,* No. 71 Cr. 829 (S.D.N.Y. Aug., 1971), Itkin admitted on cross-examination that only a fraction of these were true debts, that the trustee, Mario Brod, was his C.I.A. superior and that he prepared the list with Brod's assistance.

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3) In 1964 and 1965 Itkin testified as a witness in federal bankruptcy proceedings concerning a certain Sire Plan which involved widespread Teamster Union corruption. In testimony subsequent to the De Sapio case (*United States* v. *Lipkins, supra; United States* v. *Amato,* No. 69 Cr. 569 (S.D.N.Y. Oct., 1970) and *United States* v. *Zulferino,* No. 68 Cr. 546 (S.D.N.Y. Jan., 1971)) Itkin admitted that he had lied in those proceedings to protect his cover and further that he had so advised the F.B.I.

4) From 1965 until March, 1971 Mrs. Itkin, Herbert Itkin's second wife, was engaged in acrimonious litigation with her first husband who was seeking the custody of her two children by that marriage. In 1965 Mrs. Itkin took her two children to England in violation of an order of the Westchester County Court. She was persuaded to do this by Itkin who claimed that his government assignment required that he infiltrate organized crime in England. Since she was English, her residence there with her children, would provide him with a plausible excuse or cover for his presence abroad. Itkin admitted in testimony before a New York State Court, *New York ex rel. Itkin* v. *Hirsch*, Civ. No. 4590 (N.Y. Sup. Ct., Westchester County Nov., 1970) that he had lied in both English and American courts as to the reason for his presence in England. Itkin's explanation for these lies was that he thought his government contacts would explain to both the English and American courts that he was doing this to protect his cover.

II

The generally accepted criteria for granting a new trial on the ground of newly discovered evidence are (1) the evidence must have been discovered since the trial, (2) it

must be material to the factual issues at the trial and not merely cumulative of evidence already introduced or impeaching the character or credit of a witness, and (3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial. *United States* v. *Polisi*, 416 F.2d 573, 576-77 (2d Cir. 1969). In dealing with appellant's motion insofar as it is based upon newly discovered evidence of Itkin's perjury in other proceedings, Judge Tyler found it "so lacking in merit as to be disposed of without extended discussion." He found that the evidence was a mosaic of new twists, bits and scraps of new details of subjects either raised at trial or muted at trial for tactical reasons or excluded by the judge in evidentiary rulings on cross-examination. We again stress that the role of a reviewing court on an appeal from the denial of a motion for a new trial is a limited one. "Factual determinations made by the trial court in passing on a motion for a new trial based on newly discovered evidence may not be set aside unless the findings are 'wholly unsupported by evidence.' *United States* v. *Johnson*, 327 U.S. 106, 111-112 (1946)." *United States* v. *Silverman*, 430 F.2d 106, 119 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971). Though our powers are so limited we have no difficulty in holding that the findings below are amply supported by evidence.

A. Itkin, The Perjurer

1. The fact that Itkin had been indicted for conspiracy to commit perjury by a New York County Grand Jury was of course known to Maurice Edelbaum, De Sapio's trial counsel. On cross-examination he asked the question and received an admission from Itkin that he had been so indicted. He further questioned Itkin about a petition to

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remove the indictment to the United States District Court on the ground that Itkin had been an informant for the F.B.I. He was in possession of the affidavit of Itkin's attorney seeking this removal. He was not permitted to ask Itkin if he was guilty of the crime and no objection was raised to this on appeal.

The only thing newly discovered here is the offer of proof of Itkin's subornation of Marcus' perjury, which evidence had been deemed inadmissible in the *McCarthy* case, *supra*. This extrinsic evidence of prior misconduct by Itkin would also be inadmissible to impeach his general credibilty in any retrial of De Sapio.[1] Even if true and admissible, Judge Tyler found that "it is totally absurd to conclude that this is a crucial item, particularly given Itkin's testimony and that of Marcus at this trial." Since Judge Tyler was the trial judge in both the *De Sapio* and *McCarthy* cases, his appraisal of the evidence proferred, commands

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[1] *United States* v. *Glasser*, 443 F.2d 994, 1002-03 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971). See Proposed Fed. R. of Evidence 608, 51 F.R.D. 315, 389 (rev. draft 1971).

Appellant argues that this evidence would be admissible "'to reveal the [witness'] capacity, habit, plan, knowledge, intent [and], motive with respect to' his testimony. *United States* v. *Frascone*, 299 F.2d 824, 828-29 (2d Cir. 1962)." (Reply Brief for Appellant at 9). However, this paraphrase distorts the passage as well as the applicable rule. The *Frascone* case held that testimony about a *defendant's* prior criminal activity is admissible "to reveal the *defendant's* capacity, habit, plan, knowledge, intent, motive, or identity *with respect to the crime of which he is charged in the case on trial.*" *Id.* (Emphasis added). This argument is illustrative of appellant's continuing confusion as the identity of the defendant in this case. Further, Itkin's alleged subornation of Marcus' perjury two years before the De Sapio trial is no proof that he was prejudiced against De Sapio in this case so as to render the extrinsic evidence admissible under *United States* v. *Haggett*, 438 F.2d 396, 399 (2d Cir.), *cert. denied*, 402 U.S. 946 (1971).

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respect. *United States* v. *Johnson*, 327 U.S. 106, 112 (1946); *United States* v. *On Lee*, 201 F.2d 722, 723 (2d Cir. 1952), *cert. denied*, 345 U.S. 936 (1953).

2. We are not impressed with the claim that Itkin's post-De Sapio testimony concerning the execution of the 1965 declaration and agreement of trust, adds new evidence which would lead to a different verdict in the De Sapio case. Aside from the obvious observation that it has nothing whatsoever to do with the guilt or innocence of De Sapio or with perjury by Itkin in the De Sapio trial,[2] it is an uncontested fact that Itkin was cross-examined about it by Edelbaum and twice admitted that he didn't owe the more than $400,000 in debts listed in the document which he had attested to be true. The jury had this admission of prior perjury before it, and when Itkin offered an explanation, Edelbaum responded "No, I don't want an explanation." A reading of the testimony of Itkin in the post-De Sapio cases *McCarthy*, *Lipkins* and *New York ex rel. Itkin*, *supra*, where he was given the opportunity to explain his concededly false affidavit, reveals that he would have undoubtedly testified that about 10% of the creditors were honest and the rest were hoodlums, loansharks and illegal kickback claimants whose claims Itkin personally rejected but whose exposure would jeopardize his cover as a government in

[2] Appellant cannot reasonably rely upon *Napue* v. *Illinois*, 360 U.S 264 (1959) and *Mesarosh* v. *United States*, 352 U.S. 1 (1956). In those cases the government either knew or suspected that one of its principal witnesses had *committed perjury in the case on trial*. Itkin's perjuries in other proceedings were designed to protect his cover. As such they establish no basis from which it may be inferred that Itkin perjured himself in this case. Significantly, appellant cites no instance of actual or suspected perjury by Itkin after he surfaced in 1968 and assumed the role of a prosecution witness.

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formant and gangland infiltrator. How this would have helped the De Sapio defense is indeed difficult to comprehend.

3. Itkin's admitted perjury in the 1964 and 1965 Sire Plan proceedings was not disclosed to the De Sapio jury, but once again as newly discovered evidence, it falls far short of the criteria established in *Polisi, supra*, as justification for a new trial. It is not at all material to the factual issues in the De Sapio trial, and again is merely impeaching. Further, there is ample support for Judge Tyler's finding that it isn't even newly discovered. Edelbaum knew of and in fact questioned Itkin about his participation in the Sire Plan, which was linked with corruption of Teamster Union officials who dispensed mortgage loans for payoffs; the recipients of the loans acted through intermediaries like Itkin, who in turn took kickbacks. These crude shenanigans ultimately resulted in indictments and a pre-De Sapio trial in the Southern District (*United States v. De Feo, et al.*, No. 68 Cr. 434 (S.D.N.Y. 1968) in which Edelbaum represented one of the defendants, the late James Plumeri. In the present case, Edelbaum elicited from Itkin on cross-examination the admission that he had made payoffs to teamster officials and that he had received a kickback. He did not explore the question of Itkin's perjury in the 1964 and 1965 proceedings, the transcripts of which had long been a matter of public record. However, his reticence may well have been motivated not by his lack of knowledge of Itkin's perjury, but rather because of Itkin's predictable excuse, which he later gave in *Lipkins, supra*,—that he did lie in the Sire Plan proceedings when he failed to implicate hoodlums and teamster officials in these corrupt practices since it would expose his cover. This answer could well have provoked jury sympathy for Itkin rather than having the effect of discrediting his verac-

ity. To suggest that the admission of such evidence would change the jury verdict in the De Sapio case we find to be beyond rational expectation.

4. The final claim of newly discovered evidence of perjury is that Itkin lied or suborned his wife's perjury in the American and English custody proceedings. While this is newly discovered, it is clearly collateral and not material. Once again Itkin's explanation for his part in the struggle his wife was making to keep custody of her children, would have no effect on the outcome of the De Sapio trial except perhaps to evoke sympathy for Itkin.

In sum, looking at all the alleged newly discovered evidence, we find nothing that is material, very little that is new, and that which is new is purely impeaching and therefore not a basis for granting the motion for a new trial. *United States* v. *Curry*, 358 F.2d 904, 919 (2d Cir.), *cert. denied*, 385 U.S. 873 (1966). Itkin after all had been cross-examined for almost five days by experienced professional trial counsel. He admitted to indictment for conspiracy to commit perjury, bribery and grand larceny; he admitted to failure to file income tax returns for two years; he admitted to lies, to kickbacks and payoffs, to the issuance of about 100 bad checks and to perjuring himself in a matter involving a payoff to one Braverman. The jury obviously believed that Itkin was telling the truth with respect to his dealings with De Sapio in the "high line" venture which led to the indictment. They further had the evidence of two Con Edison officials, as well as the opportunity to hear and observe the defendant, De Sapio, on the stand. Finally, there is not a shred of evidence in the matters we have reviewed to suggest that Itkin perjured himself in the De Sapio case.

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B. Itkin, The Government Agent

The second string on appellant's somewhat splintered bow is that Itkin's post-De Sapio testimony in other cases, establishes that he was not a true conspirator with De Sapio but was in fact an agent for both the F.B.I. and the C.I.A. The relationship between the F.B.I. and Itkin in the "high line" venture was carefully reviewed by Chief Judge Friendly in the first appeal, *United States* v. *De Sapio, supra*, 435 F.2d at 282-83. William Vericker, Coordinator of the Criminal Informant's Program for the New York office of the F.B.I., was in fact called by the defense as a witness in the trial. Based upon his and other evidence Judge Friendly affirmed the jury's finding that Itkin was acting on his own in the "high line" venture, that he was a true conspirator and only reported to the F.B.I. subsequent to the termination of the conspiracy. A careful reading of the evidence now relied upon by appellant does not contradict, but in fact, supports this position. The only subsequent proceeding in which Itkin was questioned as to his relationship with the F.B.I. in the De Sapio case was an English civil defamation case before Mr. Justice Lawton and a jury in the High Court of Justice, Queens Bench Division in July, 1971 (*Phonographic Equipment Co. Ltd.* v. *Associated Newspapers Ltd.*). In that case, Itkin repeatedly testified that the F.B.I. had not directed him to target any particular defendant but that he had acted on his own. (Transcript, July 8, 1971, at 12, 16-22). He testified that he had made $4000 in the De Sapio deal, which he had shown to the F.B.I. to be photographed and that he had shown them the money wrappers which were used as evidence in the trial. (*Id.* at 29-30; se 435 F.2d at 281 n. 10). All of this confirms and conforms with the facts found by the jury and affirmed by this court.

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It is now urged that subsequent testimony reveals that Itkin was a C.I.A. agent.[3] Piecing scraps of his testimony in various cases together, appellant casts Itkin in the role of a full-time, card-carrying, time-clock-punching employee of the C.I.A. soon to be pensioned off. While Itkin has undoubtedly testified to some melodramatic episodes, there is nothing at all to indicate that the C.I.A., which is charged with national security, had the slightest interest in the corruption of the Commissioner of the New York City Department of Water Supply, Gas and Electricity. That the C.I.A. did have an interest was "a leap" Judge Tyler refused to take in denying this motion.[4] We see no reason to disturb that finding.

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[3] As Judge Tyler points out in his opinion below, a sealed file in the custody of Judge Cooper of the Southern District of New York, contains an affidavit of the General Counsel of C.I.A. He certified to the court that prior to 1964 and "from time to time in successive years" Itkin had furnished information to the C.I.A. through an intermediary. The information he divulged was deemed classified by the C.I.A. under Executive Order 10501, 3 C.F.R. 1949-1953 Comp. at 979, 50 U.S.C. § 401 (1970). Itkin has further been instructed not to disclose information given to the C.I.A. under pain of prosecution pursuant to 18 U.S.C. § 793. As a side bar discussion in the De Sapio trial, Edelbaum stated that he had information that Brod, the trustee of Itkin's deed of trust, was Itkin's C.I.A. superior and that the entire agreement which was sworn to, was a complete fraud on creditors. While references to the C.I.A. were not permitted in the De Sapio trial, defense counsel referred to "another agency," and in his summation to the jury, he referred to Itkin's claim that he worked for the C.I.A.

[4] It is interesting to note that in *United States* v. *Russo*, 442 F.2d 498, 503 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3310 (U.S. Jan. 11, 1972) this court held it to be harmless error for the trial court to reject testimony sought to be introduced by counsel for the defendant therein to the effect that Mario Brod, described as Itkin's contact with the C.I.A., would testify that Itkin's reputation for truthfulness was bad and that Brod would not believe him under oath. This court held that the jury was made fully aware of the negative aspects of Itkin's character and this additional testi-

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III

The Suppression of Evidence

Since Itkin did report his perjury in the 1964 and 1965 bankruptcy reorganization proceedings to the F.B.I. and since the C.I.A. was presumably aware of the falsity of the 1965 "agreement and declaration of trust," it is now urged that the government suppressed this evidence on the De Sapio trial. Judge Tyler found no suppression of evidence, and his finding is supported in the record. We have already pointed out that this evidence is certainly not material either to De Sapio's guilt or Itkin's perjury in the De Sapio case. Neither does it cast any light on his relationship to any government agency in the De Sapio-Marcus dealing. In any event, not only did trial counsel know of Itkin's participation in teamster corruption but, as we have pointed out (footnote 3, *supra*), he was aware that the trustee of the agreement and declaration of trust was Mario Brod, Itkin's reputed superior in the C.I.A.

We are left with the claim that the C.I.A. knew that the reason for Itkin's wife's presence in England was to establish his cover for infiltration and insinuation into organized crime in England. Since Itkin could not reveal this, the argument runs, the C.I.A. must have been aware of and in fact abetted his and his wife's perjury in the custody case where other reasons were given for their presence in England. If we accept this testimony of Itkin as a fact, there is no reason to discredit his further testimony that his wife and he believed that the "government" would make known to the English and American courts this fact of his testimony. We are not at all persuaded by

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mony could not have added more gild to the lily. The litany of Itkin's sins recounted in that opinion as having been already related to the jury, cannot at all compare in quantity or quality to those uncovered in Edelbaum's cross-examination of Itkin in the De Sapio trial.

a reading of the testimony that the C.I.A. ever advised Itkin or his wife to commit perjury in the custody case. Assuming, however, that the C.I.A. was aware of his perjury and his subornation of his wife's perjury, it is clear that the prosecutorial misconduct alleged here does not rise to the level which would warrant a new trial under the standards of *United States* v. *Polisi, supra,* 416 F.2d at 577-79; see *United States* v. *Keogh,* 440 F.2d 737, 741 (2d Cir.), *cert. denied,* 404 U.S. 941 (1971); *United States* v. *Bonnano,* 430 F.2d 1060, 1063 (2d Cir.), *cert. denied,* 400 U.S. 964 (1970). There is no evidence that the government deliberately suppressed any material evidence or refused to honor a request to turn over evidence. On the contrary, massive amounts of Jenck's Act material (18 U.S.C. § 3500) was provided defense counsel. The peripheral impeaching evidence gleaned from collateral cases was simply not material to De Sapio's guilt, and the government's failure to disclose it to appellant could not have prejudiced him in any way. *United States* v. *Polisi, supra,* 416 F.2d at 577. Had it been made available in the De Sapio trial it would have cast Itkin in the role not only of a valorous government informant but a dedicated husband by the side of a distraught mother fighting for the custody of her children.

After carefully reviewing all of the arguments raised by counsel and all of the testimony upon which they are based, we affirm the order below denying Carmine De Sapio a new trial.

The alternative relief sought by appellant is an evidentiary hearing which presumably will provide the opportunity to once again cross-examine Itkin as to his relationship with the government and thus hopefully provide the new evidence which has been so clearly lacking here. We see no reason to provide this relief and no precedent for it. In our view the time for finality has come.

Affirmed.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

CARMINE G. DE SAPIO,

Defendant.

TYLER, *D.J.*

On December 6, 1971, defendant's second motion for a new trial was argued to this court.

In essence, defendant contends that "newly discovered evidence" has arisen from the records of certain criminal trials conducted in this court after the verdict in this case on December 13, 1969, in which Herbert Itkin was a witness. It is said that this evidence impeaches Itkin's credibility. A similar claim is made in respect to civil proceedings in a Westchester County court and before the Queens Bench Division of the High Court in England. Second, it is argued that post verdict proceedings, substantially those described above, have revealed that Itkin was an employee or agent of the Central Intelligence Agency ("CIA"), the detailed facts of which relationship are said not to have been known to defendant's trial counsel during this case. Third, it is urged that there is a substantial probability that the government, acting through the CIA, encouraged, if not masterminded, Itkin's lies, deals, cheats and criminal schemes, including the "high line venture" involved in this case while paying Itkin and affording him special tax relief and other perquisites in the bargain.

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The first branch of the motion is so lacking in merit as to be disposed of without extended discussion. Whatever test is used to evaluate a motion for a new trial on the grounds of newly discovered evidence, see the decision of the Court of Appeals in this case at 435 F.2d 272, at page 286 (2d Cir., 1970), American courts, so far as I can determine, have never granted a new trial solely because imaginative counsel, armed with further impeaching material acquired post-trial, suggests that a new jury might be persuaded thereby to render a verdict of acquittal, except, perhaps, in cases where prosecutorial misconduct has engendered false evidence or, possibly, the deliberate withholding of relevant evidence. *Ibid.*, at page 286, f.n. 14.

Defendant's new counsel on this motion fall far short of the mark of showing that the alleged "newly discovered" evidence was suppressed by the prosecution; indeed, it is a matter of record that most, if not all, of the evidence relied upon to support the first contention was not only known to the defense at trial but used by defense counsel for cross-examination of Mr. Itkin. Trial counsel cross-examined Itkin for substantially five days in which he skillfully and emphatically elicited admissions of lies, cheats, criminal schemes, tax evasions, and other shabby conduct. Two items clearly known to and either used or attempted to be used by trial counsel are said now to be the subjects of additional evidence; (1) the Marcus-Itkin perjury indictment in the Supreme Court of New York, New York County, and (2) the agreement for the benefit of creditors prepared by or for Mr. Itkin but never effectuated. See cross-examination by movant's counsel on November 19 and 20, 1969. As to the first, the claim is that an offer of proof by defense counsel at the trial before the undersigned of *United States* v. *McCarthy, et al.* in 1970 indicates that at a meeting between Itkin and Marcus at the Garden Cafe,

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Itkin coached Marcus to lie the next day before a grand jury. Whether true or not, it is totally absurd to conclude that this is a crucial item, particularly given Itkin's testimony and that of Marcus at this trial. As to the second matter, not only did trial counsel know about the "trust agreement" but he also knew that it was prepared with the help of one of Itkin's CIA contacts; furthermore, I find it difficult to assume now as then that he did not believe that the document may have contained false statements—otherwise, it scarcely can be understood why he wished to delve into the matter.

Less clear, possibly, is another claimed newly discovered matter, the transcript of Itkin's allegedly perjurious testimony in the reorganization proceeding in this court, *In re The Sire Plan etc.*, in 1964 and 1965. Surely, counsel knew of this testimony; he asked Itkin one or two questions about it. See, e.g. SM 1126. The claim now is that counsel had no knowledge of Itkin's false statements therein. The nature and substance of counsel's few questions at trial, in my view, squarely refute such a claim. Moreover, because of the underlying nature of Itkin's involvement in Sire Plan, any tactical reasons of counsel to explore this in depth, to put it kindly, were and are highly debatable.

The final "newly discovered perjury" of Mr. Itkin devolves from custody litigation commenced in Westchester County in the mid-sixties and relating to the children of Itkin's second wife by her first marriage to one Hirsh. It is beyond cavil that defense counsel knew about this litigation during this trial. See, e.g. DeSapio Ex. C id. Nevertheless, I will assume that he did not know all the details of the case and Itkin's affidavits and testimony therein, if only because the opinion of the court (Trainor, *J.*) apparently was not published until March, 1971. In summary, this opinion and Itkin's testimony are said to reveal that Itkin and his second wife took the children to England and kept them there in violation of the New York court's con-

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trary interlocutory order or orders, that an English court finally directed the Itkins to return the children to Hirsh in this country and that, perhaps most importantly, Itkin filed various affidavits and gave testimony in the English and Westchester County courts which was knowingly false, to the knowledge and with the complicity of the CIA, in order to furnish Itkin "cover" for his CIA assignment in the United Kingdom. Assuming *arguendo* that these are the facts, it is difficult to understand why counsel, to a certainty, would wish to expose to a jury Itkin's CIA "cover" or, if he did, that the jury would treat all of this as a fraud on the English [1] courts sufficient to impel them to acquit the defendant. Accepting, in other words, that there was governmental misconduct by virtue of CIA complicity in all this,[2] I find it difficult to conclude even that the jury "might" reach a different verdict. See *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir., 1928); see related discussion *infra*. Absent assumption of CIA misconduct, I have no difficulty, given the lengthy cross-examination dwelling on Itkin's other pecadillos at trial, in concluding that this evidence by no means "would probably produce a different verdict, if a new trial were granted." See *Berry* v. *State*, 10 Ga. 511, 527 (1851).

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[1] Contrary to what I understand movant to assert, my reading of Itkin's testimony and Judge Trainor's opinion fail to indicate that Itkin lied to or committed a fraud directly upon the Westchester court. As I read Itkin's testimony, which is cluttered with many interruptions of counsel and the court, he appears to have told the court of his CIA "cover", why he took his second wife to England, etc.

[2] For my part, I cannot be certain from all that I have read that the CIA specifically directed or encouraged Itkin to tell lies to the English court.

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In sum, dealing with movant's first contention, I view it as a clever mosaic of new twists, with concededly bits and scraps of "new details," to subjects either brought up at trial, or muted at trial for tactical reasons, or excluded by the judge in evidentiary rulings during cross-examination. If in hindsight the judge made incorrect rulings, or if trial counsel made mistakes in judgment, these are not proper building blocks for a new trial.

The second and third contentions of defendant also center upon the claimed role of Itkin as an employee of the CIA. Initially, there is the question of whether or not the defendant is right in contending that the prosecution or the court suppressed evidence of Mr. Itkin's relationship with the CIA. Despite the somewhat equivocal affidavits of present counsel and trial counsel, I know that the latter would not deny that the trial notes of the undersigned and the record clearly indicate that all of the participants in this trial were aware that Mr. Itkin had acted as an agent or informant or employee for the CIA for a period of time beginning at least as far back in 1963 or 1964. On November 19, 1969, this court expressly refused trial counsel's specific application for an evidentiary hearing in respect to the CIA employment of Mr. Itkin.[3] Moreover, the Jencks Act (18 U.S.C. 3500) material turned over to the defense necessarily revealed to counsel that Itkin had been a CIA agent or informant and, at least in part through the offices of that agency, had been introduced to the FBI in March, 1963.

Turning to the second and presumably more serious facet of defendant's "CIA contentions", it developed at oral argument of the motion that the lawyers for defendant are

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[3] This ruling, so far as I can determine, was never appealed by movant, or, if it was appealed, was not mentioned or criticized by the reviewing court.

seeking a hearing, at least initially, to examine Itkin and a responsible official of the CIA to ascertain the detailed nature and scope of Itkin's employment by that agency. Counsel candidly admitted that they have no evidence whatsoever that the CIA had anything to do with Itkin's involvement in the scheme which is the subject of this indictment and trial. Indeed, there is no evidence to such effect; more than that, such evidence as there exists points to quite a different set of facts. Perhaps the most important and compelling evidence in this area came out in the trial during the testimony of Agent Vericker of the FBI. Called by counsel for the moving defendant, Vericker on December 3, 1969 testified that he first met Itkin through the auspices of another federal agency. This euphemism[4] certainly did not mystify astute defense counsel who already knew from the papers that this meant the CIA. More compelling, the thrust of Vericker's testimony suggested almost beyond cavil that Itkin was in the high line venture on his own and that the FBI and no other agency had the authority and interest in appraising what information Itkin might thereafter furnish in this and other domestic criminal endeavors in which Itkin thrust himself.

As this court promised to counsel at the conclusion of the argument, I examined once again the sealed file of documents relating to the removal action before Judge Cooper of this court on December 7, 1971. That file reveals that by affidavit verified in October, 1968, the general counsel of the CIA certified to this court and to the Supreme Court of New York, New York County, *inter alia*, that from prior to 1964 and "from time to time in successive years . . ." Herbert Itkin had furnished information to that agency through an intermediary. Such information

[4] Required by the court's exclusionary rulings of November 19.

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was deemed classified by the CIA under Executive Order 10501, 18 F.R. 7049, November 10, 1953, as amended. Further, according to the CIA affiant, Itkin has been instructed not to disclose information given to the CIA or the identity of the intermediary or intermediaries under pain of prosecution pursuant to Title 18, United States Code, Section 793.

What has already been said demolishes counsel's strident claims that it has only recently come to lights in the cases of *United States* v. *McCarthy, et al.*;[5] *United States* v. *Lipkins* (Before Bonsal, *J.* in 1971), and in the civil defamation case before Mr. Justice Lawton and a jury in the Queens Bench Division in July, 1971 that Itkin admitted or implied "employment" by the CIA. Even more significant, Itkin in those cases made perfectly clear when given an opportunity that the CIA had nothing to do with his involvement in such domestic criminal schemes as the high line venture (this case), the Jerome Park Reservoir affair (*United States* v. *Corallo, et al.*), etc.. By way of illustration, at page 20 of the transcript of Itkin's cross-examination before Mr. Justice Lawton handed up by defense counsel on this motion, the following appears:

> "Q. Mr. Itkin, you were in this case (*United States* v. *Corallo, et al.*) as a participant and not on assignment from the Government, weren't you? A. The Government never gave me an assignment in any specific thing. Each individual deal was my decision for my infiltration."

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[5] It may be instructive, given the movant's thesis that so much "newly discovered evidence" came out on cross-examination in *McCarthy*, that all defendants therein were convicted.

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Again, somewhat similarly, at page 18 of the same transcript:

> "Q. (By Mr. Justice Lawton). Then you were recruited with knowledge of the CIA for FBI work? A. The CIA asked me.
>
> Q. Asked you to help the FBI. You were asked, as I understand your evidence and it is for the jury whether they believe it, you were asked to infiltrate organized crime? A. Yes, sir.
>
> Q. The result is that you mustn't obviously have a pay check coming from the FBI? A. That's right, sir."

These answers are consistent with Itkin's testimony in this trial, with his earlier testimony before Judge Weinfeld in the Jerome Park Reservoir case, and so far as I can determine, in every case since the jury verdict in this case, most particularly in *McCarthy* where, as already noted, the writer was the trial judge. There is no evidence to the contrary. Thus, boiled down to its essentials, movant and counsel would have me assume that the CIA, obviously without direct jurisdiction in the domestic criminal field, and having introduced Itkin to responsible agents of the FBI in 1963, would nevertheless have paid and instructed Itkin to participate as its agent or employee in the high line venture and to implicate Mr. DeSapio and others in that scheme. This broad leap I refuse to take.

In fairness to moving counsel, however, their request for a hearing could be viewed in a different light—viz. a request to develop the full facts of Itkin's CIA "employment relationship", including pay, perquisites, etc., with the ultimate claim that a new jury be convened to hear the familiar argument that Itkin was not a conspirator but a directed plant, not just of the FBI but of the CIA as well. In view

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of the litigation of the essential issue here involved and what happened in this trial and in *United States* v. *Corallo*, in respect to that issue, the chances of a new jury (or a new judge) reaching a different result or conclusion are painfully thin.

Finally, it is worth emphasizing that this motion casts up no "newly discovered" evidence directly bearing on Itkin's testimony regarding defendant's involvement in the high line scheme. It scarcely need be added that the same is true with respect to the testimony of such important witnesses as Hadden, Ulrich and defendant himself, not to mention other evidence such as the tape recording in the New York County District Attorney's office, the currency bands, etc. In sum, the best to be said for the present motion is that it casts up bits and scraps of further cross-examination material which, along with hindsight of clever counsel, could be used to cross-examine Itkin differently and better two years later. Given the five days of hard but fair cross-examination by able counsel two years ago, I doubt that any better job could be done or a different result achieved today.

This court declines to hold another evidentiary hearing as prayed. Motion for a new trial and other relief denied in all respects.

It is so ordered.

Dated: December 13, 1971

s/ R. TYLER, JR.
U.S.D.J.

APPENDIX D

Constitutional, Statutory and Regulatory Provisions Involved

United States Constitution

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to

effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in this company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

APPENDIX D

Constitutional, Statutory and Regulatory Provisions Involved

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics,

or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212.

Federal Rules of Criminal Procedure

Rule 33, NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

As amended Feb. 28, 1966, eff. July 1, 1966.

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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

CARMINE G. DE SAPIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

CARMINE G. DE SAPIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Carmine G. DeSapio, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated February 25, 1972 which affirmed a denial of Petitioner's motion for a new trial upon the grounds of newly discovered and suppressed evidence.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is set forth in Appendix B of this petition (33a-47a).

The opinion of the District Court is not reported and is set forth in Appendix C of this petition (48a-56a).

The opinion of the Court of Appeals upon the Petitioner's direct appeal from the judgment of conviction is reported under the title, *United States* v. *DeSapio*, 435 F.2d 272,

cert. den., 402 U.S. 999 (1971), *rehearing den.*, 403 U.S. 941 (1971). It is set forth in Appendix A of this petition (1a-32a).

Jurisdiction

The judgment of the Court of Appeals was entered on February 25, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional, Statutory and Regulatory Provisions Involved

(1) The Fifth and Sixth Amendments to the United States Constitution.

(2) 18 U.S.C. §§ 371, 1951 and 1952.

(3) Rule 33 of the Federal Rules of Criminal Procedure.

These provisions are set forth in Appendix D to this petition.

Questions Presented

Itkin was an indispensable government witness at the Petitioner's trial. Thereafter, while testifying for the government at other criminal trials and in closed proceedings, Itkin revealed that:

A. At the direction of the Government or with the government's acquiescence, he had perjured himself and suborned perjury on numerous occasions for the purpose of protecting his undercover relationship with the government.

B. His relationship with the government, as well as the benefits he derived therefrom, were far more extensive than were revealed at the Petitioner's trial.

Based upon these sworn admissions, the Petitioner moved for a new trial upon the grounds that (a) the government had suppressed this evidence at the time of trial, and (b) even absent suppression, due process and the interest of justice required a new trial since Itkin's credibility and his status had been the decisive factors in the jury's determination. The Petitioner also requested a hearing in aid of his motion.

Although the government did not deny the allegations as to Itkin's perjuries, and merely sought to minimize the significance of the allegations as to Itkin's status, the District Court denied the motion without a hearing.

The questions presented for review are:

1. May the defense in a criminal case, as a matter of right, impeach a prosecution witness by eliciting from him that he has, with the complicity of the Government, perjured himself and suborned perjury for the purpose of securing a governmental objective, as to facts unrelated to the operative facts of the case on trial?

2. Were the due process standards of *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *Mesarosh* v. *United States*, 352 U.S. 1 (1956), violated when the Government failed to disclose, at the time of trial, its knowledge of Itkin's perjuries and of the government's complicity in those perjuries?

3. Where the jury has been instructed that it must find as a fact that the chief government witness was a co-conspirator, rather than a government agent, before his acts and out-of-court statements may be attributed to the defendant, was the government's failure to reveal to the defense a substantial amount of information concerning the scope of Itkin's relationship with the government and the extent of the benefits that he derived therefrom, violative of constitutional due process?

4. To the degree that the Courts below relied upon speculation for the conclusion that some of the newly discovered evidence had been known to or was available to the defense at the time of trial, was it error to deny a hearing as to that issue?

5. In view of the substantial disclosures obtained by the defense, through the indirect means of examining transcripts of other trials, was it error for the Courts below to deny the Petitioner a hearing for the purpose of examining Itkin and his government contacts to determine the true extent of: a) his total relationship with the United States Government at the time of the events of this case; b) the nature of the relationship between the CIA and the FBI as to their contemporaneous shared use of Itkin, and c) the truth of Itkin's assertions as to the government's complicity in his perjuries?

Statement of the Case

1. Abbreviations used on this Petition

The following abbreviations are used in this petition:

"a"—The opinions and statutes which are set forth in the appendices of this petition.

"M."—The bound volume of pleadings and proceedings in the District Court upon the motion for a new trial. Copies of this volume were filed in the Court of Appeals.

"Tr."—Transcript of the Petitioner's trial.

In support of the motion for a new trial, two bound volumes of exhibits were filed with the District Court, and, thereafter, filed in the Court of Appeals. *Inter alia*, these exhibits contain extracts of testimony given at trials in which Herbert Itkin testified subsequent to the Petitioner's trial. These extracts retain the pagination of the trial transcripts from which they were taken. Citation to these extracts are by an abbreviated reference to the title of the case, followed by the page of the original transcript:

"*McCarthy*": *United States* v. *McCarthy* (Docket No. 68 Cr. 467—S.D.N.Y.—1970)

"*Amato*": *United States* v. *Amato* (Docket No. 69 Cr. 569—S.D.N.Y.—1970)

"*New York ex rel. Itkin*": *New York ex rel. Itkin* v. *Hirsch* (Index No. 4590/1970—N.Y. Sup. Ct., Westchester Co.—1970)

"*Zulferino*": *United States* v. *Zulferino* (Docket No. 68 Cr. 546—S.D.N.Y.—1971)

"*Phonographic Equipment*": *Phonographic Equipment Co. Ltd. & Ors.* v. *Associated Newspapers, Ltd.* (High Court of Justice, QB Division—1971)

"*Lipkins*": *United States* v. *Lipkins* (Docket No. 71 Cr. 829—S.D.N.Y.—1971)

Counsel for the Petitioner has requested that the Clerk of the Court of Appeals certify copies of all these documents to this Court.

2. History of Proceedings

After a trial by jury, in the United States District Court for the Southern District of New York, petitioner was found guilty upon three counts of the indictment, which charged:

1. Conspiracy (18 U.S.C. § 371);
2. Unlawful travel in interstate commerce (18 U.S.C. §§ 1952 & 2);
3. Unlawful use of the telephone in interstate commerce (18 U.S.C. §§ 1952 & 2).

On February 10, 1970, after denying a motion for a new trial,* the District Court sentenced the petitioner to concur-

* The pre-sentence motion for a new trial was made upon facts and grounds unrelated to those presented by the proceedings now before this Court for review, see *United States* v. *DeSapio*, 435 F. 2d 272, 285-288 [26a-29a] (2nd Cir., 1970).

rent terms of two years imprisonment on each count, and further ordered that he pay a fine of $4,500.

The Court of Appeals affirmed the judgment of conviction in an opinion on November 16, 1970 (435 F.2d 272)* [1a]. On May 24, 1971, this Court denied certiorari (402 U.S. 999, *rehearing den.*, 403 U.S. 941); Justices Douglas and Stewart dissented from the denial of certiorari. Justice White did not participate in the consideration or determination of the Petition.

On June 25, 1971, Petitioner commenced service of his sentence. He remains in custody at the time of the filing of this Petition.

On October 27, 1971, Petitioner moved in the District Court for a new trial upon the ground that the prosecution had suppressed evidence of material importance to the defense, and upon the further ground that the defense had discovered evidence which required a new trial, pursuant to F.R. Crim. P., 33, and elemental standards of due process.

The motion was supported by the affidavit of counsel, detailing the facts upon which a new trial was sought (M. 19-69), and by the affidavit of Petitioner's trial counsel, stating that the evidence had not been known to the defense at the time of trial (M. 70).

Also submitted as an exhibit upon the motion was a volume containing, *inter alia*, extracts from various judicial proceedings in which Herbert Itkin, the chief government witness, had testified since the date of his testimony at Petitioner's trial (see pp. 4-5, *supra*).

---

* Rehearing and rehearing *en banc* were denied on December 28, 1970.

The government opposed the motion through the affidavit of an Assistant United States Attorney who did not purport to have any knowledge as to the truth or falsity of Itkin's sworn admissions upon which the motion was predicated (M. 74-92). A reply affidavit was thereafter submitted by Petitioner's counsel (M. 93-115). The District Court permitted the New York Civil Liberties Union to file a statement *amicus curiae* (M. 211).

The motion came on to be heard on December 6, 1971, and the Court reserved decision (M. 212).

On December 13, 1971, the District Court, in an opinion, denied the motion in all respects, and declined to grant the Petitioner a hearing (48a-56a). The Court of Appeals opinion affirming the judgment of the District Court was filed on February 25, 1972 (33a-47a).

3. Itkin's evidence against Petitioner

The Court of Appeals considered Petitioner's direct appeal on the basis that "the case was a close one and that, in consequence, errors that might be regarded as non-prejudicial in an open-and-shut trial would be grounds for reversal here" (13a).

The trial evidence has been reviewed by the Court of Appeals (3a-14a), and will not be detailed here. Since the Courts below have disputed the admissibility, materiality and "newness" of the newly discovered, suppressed evidence, all of which relates to Itkin's credibility and status, we will address ourselves to those aspects of the trial proof.

The indictment charged that Petitioner had conspired with Herbert Itkin, James Marcus, Antonio Corallo and Henry Fried to bribe Marcus, then Commissioner of the New York City Department of Water Supply, Gas & Electricity, to withhold permits sought by Consolidated Edison Company of New York until Con Ed would agree to reward construction contracts to Fried's companies (2a).

A. Itkin's Credibility

Herbert Itkin's testimony was essential to establish the Petitioner's alleged *criminal involvement* and to establish the jurisdictional prerequisites of interstate travel and interstate telephone communication. If Itkin had not testified or if the jury had not believed him, Petitioner could not have been convicted.*

At trial, Itkin's background posed a unique obstacle to the efforts of defense counsel in their attempt to impeach his credibility. While steadfastly adhering to the claim that his ultimate goal was a patriotic one, he readily admitted to a career of bribery, kickbacks and double dealing. He wore his crimes as so many medals awarded to him in his campaign against crime.**

The only appropriate means by which Itkin could have been effectively impeached would have been to establish that, under the direction and approval of his governmental sponsors, he perverted the very judicial processes which both claimed were the ultimate objective of their conduct. It is precisely that type of proof which was unavailable to the de-

---

* The remainder of the government's evidence breaks down into four categories of proof: (1) that a conspiracy existed (testimony of Marcus, Hadden Ulrich and Crawford); 2) that Corallo was a member of the conspiracy (testimony of Marcus and tape recordings of conversations between Itkin, Marcus and Corallo); 3) that Itkin and Fried had made extrajudicial statements implicating Petitioner (testimony of Marcus and Crawford and tape recordings of conversations between Itkin, Marcus and Corallo); and 4) that Petitioner offered, without a suggestion of compensation, to assist Con Ed and the City in resolving their differences (testimony of Ulrich and Hadden). Hadden, Ulrich and Crawford were Con Ed executives.

** "Award" is perhaps a most appropriate description, since, as found by the Court of Appeals, the government permitted Itkin to engage in his criminal conduct (16a-18a).

fense at trial, but which was discovered in testimony given by Itkin at trials which followed that of the Petitioner.

The newly discovered evidence established, by Itkin's sworn admissions, that he had perjured himself and had suborned perjury in Federal, State, and foreign courts, mainly at the direction of the United States Government, for the purpose of protecting the secrecy of his relationship with the government. The thrust, then, is Itkin's willingness to lie under oath in the service of his governmental objective, and the willingness of his government superiors to have him do so.

In testimony given prior to the Petitioner's trial, Itkin categorically denied ever having committed perjury:

> "Q. Did you ever commit perjury? A. No.
>
> "Q. Did you ever assist anyone to commit perjury? A. Not at all." *United States* v. *Corallo,* 67 Cr. 1050 (S.D.N.Y., 1968) at p. 1260.

i) Itkin's Repeated Perjuries in State and Foreign Courts

From March, 1965 until March, 1971, Itkin and his wife were engaged in protracted litigation against her prior husband for custody of the children of her prior marriage. The litigation arose from the fact that in March, 1965, Mrs. Itkin took the children to England in violation of a New York Supreme Court order. Over the following six years, twenty-seven orders were issued by at least fifteen different judges of State, Federal and English Courts. The matter was finally terminated in the last of these proceedings in which the New York Supreme Court, Westchester County, awarded permanent custody to the childrens' father.*

---

* A copy of the Court's opinion is included in the volume of exhibits which was filed with the District Court in support of this motion for a new trial. It sets forth in detail the history of the proceedings (see also, M. 36-39).

The testimony taken in this last proceeding had been sealed and was not made public until May 13, 1971, when it was concluded by the Court that: ". . . if our national security is bound up in a person of Itkin's character, and the testimony he gave at this trial, then our country is indeed in serious trouble" (Opinion of McCullough, J., p. 3). This opened a whole new chapter of revelations as to Itkin's willingness to deceive the courts for what he and his government superiors considered the higher purpose of protecting his governmental mission—his "cover".

In the Westchester proceeding, Itkin admitted under oath that in the preceding State and English proceedings, at the direction of the CIA, he perjured himself and suborned his wife to commit perjury. He now asserts that by virtue of his foreign assignment for the CIA, his wife was made to move to England with the children so as to better assist him in establishing a cover. He admits that, to prevent her prior husband from recovering the children, he and his wife commenced a perjurious ward-of-court proceeding in the English courts at the instigation of and under the continued supervision of the CIA; that he and the CIA suborned his wife to commit perjury in the English courts, and that he, himself, lied "right and left" in the English proceedings. He has also sworn that he and the CIA persuaded his wife to agree to all of the foregoing unethical conduct by representing to her that the English Courts would be advised, *ex parte*, of the true facts.

Itkin admitted under oath that, during the protracted history of the custody battle, he had perjured himself and had suborned his wife to commit perjury at the direction of the CIA for the purpose of concealing his CIA cover. These perjuries were committed in the English Courts and in the Westchester Family Court and the New York Supreme Court (*New York ex rel Itkin*, 1717,1734, 1749-1757, 1870-1873; 1882-1889, 1944, 2028; *Lipkins*, 237).

Itkin's explanation for failing to reveal this information when he was asked about perjury and subornation of perjury at the *Corallo* trial (*supra*, p. 9), is that he did not fully understand the question (*Lipkins*, 230). He asserts, without contradiction, that he subsequently realized his mistake and brought it to the attention of the government attorneys:

> "A. Then I brought to their [the United States Attorneys] attention that while I was undercover in England and in a custody case with my wife and her children, I told her to say that we had come to England for other purposes than the CIA, and I had to do this, so we developed a cover story.
>
> "Q. Who developed a cover story? A. The CIA and I."

The prosecutors, in turn, did *not* reveal it to petitioner's counsel.

ii) Itkin's Perjurious Trust Agreement

In October, 1965, Itkin executed an "agreement and declaration of trust" for the benefit of his alleged creditors. The agreement was executed under penalty of perjury, and was also signed by one Mario Brod, as trustee, and by certain of Itkin's alleged creditors. In that document, Itkin swore that he was actually indebted to the listed creditors for a total of $435,000, that his temporary financial embarrassment was due to legitimate personal expenses, and that he had transported his second wife and two children to England for the sole purpose of reducing his expenses (The trust agreement is set forth in the volume of exhibits filed with the District Court upon Petitioner's motion for a new trial).

At the Petitioner's trial, Itkin was questioned about this document.

Since our interpretation of his testimony differs from that of the District Court and the District Court's interpretation differs from that of the Court of Appeals, we have set forth the controversial portion of his testimony in the margin.*

---

* [Cross-examination by defense counsel]

"Q. Mr. Itkin, you told us yesterday that in 1965 you owed approximately $400,000; is that right? A. I said a list was prepared indicating that. I believe that is what I said.

"Q. Well, did you owe $400—some odd thousand? A. No, I did not, sir.

"Q. You say that in 1965 you didn't owe $435,000? A. I said I prepared a list—

"Q. No. I asked you, sir, the direct question and I would like a direct answer. A. I did not actually owe $400,000.

[Trust agreement marked for identification]

"Q. I show you this paper and ask you if this is a copy of a trust agreement you executed on the 22nd day of October, 1965 (handing)? A. Yes, it is, sir.

"Q. And in that agreement did you say that the statements made by you and the representations made by you in this agreement were made under the penalties of perjury? A. That's right.

"Q. Were you referred to in this agreement as the donor, d-o-n-o-r? A. Yes, sir, I was.

"Q. Did you represent in this agreement that your liabilities are approximately $435,000? A. Yes, I did, sir.

"Q. Do you say now to this jury that wasn't true? A. That is not what I said.

"Q. Well I ask you the direct question again: When you executed this agreement in 1965, did you owe to creditors $435,000? Yes or no? A. I can't answer that yes or no, I can explain it.

"Q. No, I don't want an explanation. You just answer the questions. A. I cannot answer that.

"Q. Mr. Rooney will have an opportunity on redirect" (Tr. 678-680).

We respectfully submit that Itkin merely equivocated as to whether the true total of his debts was that which was recorded in the trust agreement. In its opinion, the District Court found it "difficult to assume" that defense counsel "did not believe the document may have contained false statements—otherwise, it can scarcely be understood why he wished to delve into the matter" (50a). The Court of Appeals reads the same testimony as showing that Itkin "admitted that he didn't owe the more than $400,000 in debts listed in the document which he had attested to be true" and faults defense counsel for not having permitted Itkin to offer an explanation (41a).

If the only issue was whether the list was completely accurate, the matter could be laid to rest as being a reasonable difference of opinion. However, that is far from the case. Since the petitioner's trial, Itkin has testified that only ten percent (*Lipkins*, 251) of the debts on the list were true debts; that the others were added to the list for the purpose of protecting his cover for the FBI and the CIA (*McCarthy*, 642-652, 1023-1027; *New York ex rel Itkin*, 1880-1881); that the commission of this perjury and fraud was supervised by his CIA superior, Mario Brod, who acted in the dual roles of trustee (*New York ex rel Itkin*, 2049-2054), and attorney (*McCarthy*, 863-864) for Itkin; and that Brod prepared the perjurious lists (*McCarthy*, 1023-1025), "directed" and "ordered" Itkin to sign the false affidavits (*McCarthy*, 447; *Lipkins*, 243-253); and went so far as fraudulently to sign Itkin's name to an affidavit (*McCarthy*, 643-644).

The extent of the plot and its true purpose—to protect Itkin's cover—is set forth in *Lipkins* at 243-253.

Significantly, while focusing upon the interpretation that Itkin, during Petitioner's trial, admitted the list to be false, the Court of Appeals omits any reference to Petitioner's actual argument:

> "What was not known was that: 1) Brod [Itkin's CIA superior] instructed Itkin to execute the agreement; 2) the scheme was for the purpose of protecting Itkin's cover, and 3) the statements of fact contained in the document were knowingly false on the part of Itkin and Brod" (Petitioner's Brief in the Court of Appeals, p. 17).

The undisputed fact is that the government knew all of this and did not advise the defense.

B. Itkin's Perjury in Federal Court

In testimony given by Itkin at trials subsequent to the Petitioner's trial, it was learned for the first time that in 1964 and 1965 he had been called as a witness in Federal bankruptcy proceedings involving a certain Sire Plan (*Lipkins*, 233-236; *Zulferino*, 76). Itkin has now admitted that he committed perjury at both hearings (*Lipkins*, 234-235); he did so to protect his cover for the government (*Zulferino*, 34-35, 76-77; *Lipkins*, 235-236); that the FBI told him if he blew his cover he would be killed (*Amato*, 670); and the FBI was informed of his perjurious testimony within a day or two after it was given at the first hearing and before the second hearing (*McCarthy*, 928, 1125-27; *Amato*, 660-661).

The breadth of Itkin's perjury in connection with the Sire Plan was such that he, himself, has characterized it as having "lied constantly" (*McCarthy*, 1027-28, 1126-27). When asked how he reconciled this now admitted perjury with the denials he gave at the Corallo trial (*supra*, p. 9), Itkin swore that after the Corallo trial was over, he realized he had made a "mistake" in not revealing the Sire Plan perjury and he brought this fact to the attention of the government (*Lipkins*, 234). It was not revealed to petitioner's counsel.

At the Petitioner's trial, mention was made on cross-examination concerning the Sire Plan—*but not concerning the Sire Plan bankruptcy proceedings*. Itkin's full testimony in this regard is set forth in the margin.*

There is no indication whatsoever that defense counsel had been aware of the fact that Itkin had testified in any proceeding concerning the Sire Plan, much less that he had perjured himself and that the FBI knew of it. As with many of his other illegal deals, Itkin was merely questioned by the defense as to whether he had received a kickback in return for having obtained financing for the plan.

C. Itkin's Subornation of Marcus' State Grand Jury Testimony

In December, 1967, Marcus was called before a New York County Grand Jury and perjured himself as to his involvement with Itkin in selling the powers of his office. On June 21, 1968, Itkin was indicted by the New York County Grand Jury upon the charge of suborning Marcus' perjury. The case has been removed to the United States District Court for the Southern District of New York, and has not yet been brought to trial. In the interim, Marcus

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* "Q. Are you familiar with the Sire Plan? A. Yes, I am.

"Q. In connection with the Sire Plan, did you obtain any monies from the Sire Plan? A. Yes, I did.

"Q. Was that with respect to your financing or obtaining financing for the Sire Plan? A. Yes, sir, it was.

"Q. Did you make a payment to the Teamsters or some Teamster officials? A. Yes, I did.

"Q. Did you receive part of that as a kickback? A. Yes, I did, sir.

"Q. Any of this money ever turned over to the FBI? A. Some of it was.

"Q. How much was it and when? A. But they didn't keep it. I turned some over and they made photographs of it——

"Q. And gave it back to you? A. I insisted that they did" (Tr. 1126-27).

has pleaded guilty to the perjury and has served a term of imprisonment for it.

At the Petitioner's trial, the defense was prohibited from questioning Itkin as to whether he had actually suborned Marcus to commit perjury. Since the trial, independent evidence has been discovered which would enable the defense to establish (a) that Itkin did, in fact, suborn Marcus' testimony, and (b) that Itkin has perjured himself in denying such subornation, both by affidavit and in other trial testimony.

Aside from the general issue of credibility, the subornation in question was particularly relevant to the present case. The subject matter of the suborned testimony involved individuals (Marcus, Corallo and Itkin) and events (the Jerome Park bribery-conspiracy) which formed part of the government's proof at the Petitioner's trial (3a, 14a-15a). Moreover, the subornation occurred at a point in time when Itkin was allegedly telling the truth to the authorities and had allegedly ceased to act independently of them (12a, 16a-17a).

In *McCarthy*, at pp. 740-746, Itkin acknowledged that on the evening before Marcus was to testify in the Grand Jury, he and Marcus met at the Garden Cafe on East 15th Street in Manhattan. Having elicited this information, defense counsel in *McCarthy* was made to give an offer of proof at the side bar relative to this line of questioning. He stated as follows:

> "I intend to show that on that night • • • he [Itkin] instructed Mr. Marcus in giving false testimony before the Grand Jury. I intend to show that there were two detectives from Mr. Hogan's [District Attorney of New York County] office at the Bar who overheard this and he was then indicted for perjury • • • "

The trial Judge in *McCarthy* (who was also the trial Judge at the Petitioner's trial), precluded defense counsel from going into the details of the meeting and would only permit Itkin to be asked whether he was indicted for perjury.

During the *Lipkins* trial, it was confirmed that the Itkin-Marcus meeting at the Garden Cafe had been observed by detectives of the New York County District Attorney's office (*Lipkins*, 785).

Petitioner does not claim any suppression of evidence by the government in relation to Itkin's subornation of Marcus to commit perjury. Petitioner's claim is that there are two living witnesses, under the control of the New York County District Attorney's office, who, if subpoenaed to testify, establish that Itkin sought to falsify evidence concerning his relationship with the principals involved in the instant conspiracy, and this was at the same time that he was reporting to Federal agents that the Petitioner was involved in the conspiracy.

D. The Extent of Itkin's Relationship with the Government and the Benefits He Derived Therefrom

Herbert Itkin's status was crucial to the government's case. One of the defense contentions was that Itkin had not been a true conspirator, but rather had been acting under the auspices and authority of the Federal government with the purpose of gathering evidence of crime. If established, this would have required the exclusion of Marcus' testimony concerning narrations by Itkin. Moreover, the Federal jurisdictional acts, which were performed by Itkin, would not have been attributable to the Petitioner. That is made clear in the opinion of the Court of Appeals upon the direct appeal of this case (19a).

Indeed, the Court's charge instructed the jury that if Itkin was, in fact, an agent and not a true co-conspirator,

then his acts and statements could not be attributed to the defendant under the conspiracy theory (Tr. 2676-2680; 2697).

In order to comprehend the astonishing nature of the newly discovered, suppressed evidence, a review of the trial proceedings as to this issue is essential. At trial, the defense was faced with the problem that its only source of information as to the nature of Itkin's relationship with the government, was Itkin, himself, and his Government superiors. Their interest in ascribing a non-governmental character to Itkin's activities is apparent. In addition, the trial Court precluded the defense from adducing evidence concerning Itkin's relationship with the Central Intelligence Agency. Indeed, any mention of the CIA was prohibited (Tr. 349-50, 483, 525, 683-89, 1081-83).

Itkin's testimony in this case leaves little doubt that the impression he created for the jury was that his sole governmental allegiance was to the FBI.

Making allowance for its partisan tone, the Government's brief in the Court of Appeals, at the time of the direct appeal from the judgment of conviction, presents a fairly accurate picture of Itkin's relationship with the government as it was permitted to be known to the defense and to the jury:

> "Itkin was introduced to the FBI by an unidentified government agent in March, 1963. Itkin volunteered without promise of reward to supply information on a confidential basis on various persons in whom the FBI was interested. For the next five years, until he went into 'custody' in early 1968 (Tr. 1158-60, 1165), Itkin maintained constant contact with the FBI, normally through fleeting meetings in public places, sometimes as often as daily. The FBI's role was purely passive. They did not assist Itkin in any way, nor did they direct him to investigate any-

> thing in particular. They simply listened to what he had to say. From time to time, Itkin would report that he himself had committed a crime, but usually after the fact. Although FBI agents obviously do not keep money that comes into their possession during the course of an investigation, Itkin did keep whatever money he succeeded in obtaining illegally. Itkin was cautioned 'quite clearly' that the FBI could not 'condone' his criminal activities or insulate him from prosecution; but the FBI did not arrest him or stop listening to his reports because he was supplying a 'tremendous' amount of information on major criminals (Tr. 1792-9, 1812, 1859-60, 1862-6, 1873-4, 1876)" (Government's brief, pp. 883-84).

There is hardly a sentence or phrase of the above noted passage which does not conflict with the newly discovered evidence.*

Thus, in *Phonographic Equipment*, Itkin disclosed: that he is a CIA "employee"; that the CIA originally gave him his assignment to infiltrate organized crime, and that in March, 1963, "my superior in the CIA brought me to the FBI and asked me if I would work for both agencies from that point on." His CIA assignments took precedence over his FBI assignments, however the two agencies accommo-

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* The government's position as to the necessity for secrecy concerning the existence and nature of Itkin's relationship with the CIA appears to vary depending upon the value which the revelation of this information, to a court and jury, *has for the government*. Although counsel for petitioner was thoroughly precluded from eliciting information concerning Itkin's CIA activities, the government in later proceedings has elicited the fact of Itkin's employment by the CIA (e.g., *McCarthy*, 1023-1024). Itkin has adopted a similar approach (*New York ex rel Itkin*, 1710, 1727, 1942, 2008, 2032). Compare Itkin's relatively free discussion of his CIA relationship in *Phonographic Equipment*, (July 7, 1971, pp. 41-42, 48-49, 51; July 8, 1971, pp. 11-12, 17-19, 28, 33-34, 38, 62), with his invokation of Executive Privilege in *Lipkins*, p. 222, during his testimony less than a month later.

dated each other. Thus, when the CIA told him to move his family to England, ". . . it was . . . decided by the FBI that whilst over here (England) I should try to find out as much as I could about American gangster infiltration." Similarly, certain of his relationships with criminals were jointly supervised by both the FBI and the CIA. He was paid by the CIA and he expects "to retire" in two years, because "then I'll have twenty years of service, counting my army time, that will give me twenty years of service" (*Phonographic Equipment*, Vol. I., pp. 42, 48; Vol. II, pp. 8, 11, 33, 62, 66).

None of the above was known to the jury at Petitioner's trial which had the difficult task of assessing the nature of Itkin's relationship with the Government. None of it was known to the trial Judge, who upon motion of the government, precluded any inquiry concerning the CIA, ". . . because I don't consider them, frankly, relevant in any sense of the word in our case" (Tr. 483).

However, since the Petitioner's trial, the Government has seen fit to adduce from Itkin the fact that he was an undercover agent for the CIA, and that he had gone to England on a CIA mission in 1965 (*McCarthy*, 1023-4). Similarly, Itkin has since freely revealed his CIA relationship, the name of his CIA superior, the length of time that he was a CIA agent (from the mid-1950's until the termination of his "cover" in 1968), and the location of his CIA operations. He has also revealed that, under the supervision of his CIA superior, he swore his wife to secrecy by means of the National Security Oath, and he, himself, had much earlier been given the oath (*New York ex rel. Itkin*, 1717, 2008; *Lipkins*, 313-314).

In turn, the CIA provided Itkin with amounts as large as $10,000 (*New York ex rel Itkin*, 1732-4); saw fit to provide a CIA agent-lawyer, who fronted for Itkin, assisted him in fraudulently holding off his creditors, and even

ordered him to engage in the perjuries described *supra*, at pp. 9-15.

It is no wonder that Itkin can now testify that ". . . my first allegiance was to the CIA . . .", and that when he wished to make demands upon the FBI he would do so through the CIA (*Lipkins*, 377; *New York ex rel Itkin*, 2032).

These revelations, made only after Petitioner's trial, afford a key to Itkin's true relationship with the government. At trial, in attempting to plumb the nature of Itkin, the defense was confined to the limited area of Itkin's activities with the FBI. The missing pieces in the puzzle of Itkin's life tended to engender the conclusion of criminality, rather than government agency. The defense and the jury were not permitted to know that, in fact, Itkin was a CIA agent, who, when so ordered by the CIA, perjured himself, suborned perjury, infiltrated crime, worked for the FBI and stopped working for the FBI. His activities were characterized by CIA techniques (long term infiltration), rather than FBI techniques (investigation and short term undercover work). His criminal infiltration was a part of his CIA duties (*Lipkins*, 199).

The newly discovered evidence also provides a radically different picture of Itkin's relationship with the FBI.

From June, 1966 through June, 1967, Itkin did infiltration work for the FBI in England and the Dominican Republic for the purpose of uncovering foreign and domestic criminals. That infiltration involved a number of the persons who are prominent figures in the present case—Corallo, Marcus and Motto. Moreover, the FBI explicitly used Itkin as an agent provocateur by requesting that he introduce various alleged criminals to each other (*Lipkins*, 353a; Government Exhibit 2506a[1] in the *Lipkins* trial).

On the direct appeal, the Court of Appeals found a number of factors to be indicative of the proposition that Itkin was not a government agent (it must be remembered that the Court had none of the newly discovered evidence before it at that time). These apparent factors have been shown to be fallacious.

Thus, the Court of Appeals indicated that the Petitioner's case was the first instance in which Itkin had reported to the FBI contemporaneously with the commission of the crimes which formed the subject of his reports (16a). It has now been revealed that as early as June, 1963, Itkin was working so closely with the FBI that he was able to arrange for the FBI to observe an illegal transfer by him of $5,000 after the FBI had examined the money and searched his person so that the actual fact of the transfer would be established beyond any doubt (*McCarthy*, 429-432).

Moreover, the opinion of the Court of Appeals found support for the theory that Itkin was an independent agent in the fact that many of his reports to the government were incomplete (17a, 19a). We have now learned that his reports were incomplete because of the nature of the mandate which the government had given him. He was to apply CIA long-range infiltration techniques to his FBI assignment (*Zulferino*, 780; *Lipkins*, 202; *Phonographic Equipment*, July 8, 1971, 17-19). He was given specific instructions by the FBI to infiltrate particular organizations and obtain evidence concerning "specific individuals" (*New York ex rel Itkin*, 2033); his reports were purposely and necessarily incomplete, and secondary to his long-range assignment (*Amato*, 639; *Lipkins*, 222-228; *Phonographic Equipment*, July 8, 1971, 12, 18, 25, 56-57).

At the Petitioner's trial the District Court acknowledged that Itkin's financial relationship with the government was material to the issue of his status (Tr. 543). Similarly, the Court of Appeals, in its opinion on the direct appeal from

the judgment of conviction, emphasized the fact that Itkin did not turn illegally obtained monies over to the FBI and doubted "his eleemosynary intentions" (19a). Indeed, Itkin's FBI contact testified to that effect at the Petitioner's trial (Tr. 1809, 1863).

Itkin has since revealed the contrary to be true. In the *Zulferino* case, he testified as follows:

> "Q. Did you ever give the FBI any part of the illegal money that you received? A. They would not receive it.
>
> "Q. What? A. They would not take it.
>
> "Q. Did you offer it to them? A. Yes I did.
>
> "Q. They said they wouldn't take it. A. No, they couldn't get involved.
>
> "Q. They did not want to get involved, is that correct? A. That is right." (*Zulferino*, 40.)

Additionally, we now find that the Federal government has consented to give Itkin a tax deduction for all the monies he spent wheeling, dealing, grafting, bribing and extorting (*Zulferino*, 79; *Phonographic Equipment*, July 8, 1971, p. 29).

Finally, it has been made clear that the FBI went so far as to direct Itkin's misuse of funds which he held in escrow as an attorney. There came a time when, according to Itkin, it became necessary for him to utilize such funds for the purpose of continuing his illegal undercover operations. He has testified, without any contradiction from the FBI, as follows:

> "But at that point I notified the FBI and said I can't stay in it, I can't control the situation with these characters, and innocent people are getting hurt. I have to get out of the mortgage field absolutely now. I can't control these fellows any more. I have done as much infiltration as I can but I can't let this keep happening" (*McCarthy*, 671-672).

Reasons for Granting the Writ

This case presents substantial questions concerning the administration of justice in the Federal Courts, the standards of disclosure to which a defendant is entitled as a matter of due process of law, and the new trial requirements of Rule 33 of the Federal Rules of Criminal Procedure.

The use of agents-provocateurs is a central issue in contemporary discussion of police techniques. Herbert Itkin presents a case study for analysis of that issue. He has provided the Government with an excellent record of convictions; however, the government's encouragement, toleration of, and complicity in his illicit behavior, strike at the core of our basic concepts of civilized conduct. In utilizing Itkin for domestic criminal infiltration, the government has applied the classic espionage approach—and all that entails. The issue immediately before this court is whether that approach should stop at the Courthouse door. We respectfully submit that when a jury is asked to convict a citizen upon evidence produced by means of a Herbert Itkin, justice and fair play demand that the jury be fully informed as to the background and nature of the creature upon whose word it is being asked to convict.

1. A witness' past willingness to swear falsely is always of the highest materiality. His admissions of perjury may not be excluded from evidence upon the rationale that his character has been impeached by reference to other types of misconduct. In the present case, Itkin's perjuries were doubly significant since they demonstrated the nature of his relationship with the government and impeached not only Itkin, but also the evidence gathering technique of which he was a part.

On this motion for a new trial, the District Court was presented with three instances in which Itkin had committed one or more perjuries. Two of these were at the instigation of the government. One was with the acquiescence of the government. All of them were for the purpose of protecting his cover so as to further his infiltration. Following the Petitioner's trial, while testifying as a government witness, Itkin admitted all of these perjuries and the government's complicity therein. In no instance has the government repudiated his claims. The Court of Appeals has held that these specifications of perjury were immaterial to the Petitioner's guilt or innocence, and, therefore, do not warrant a new trial.

We submit that these perjuries were material in three respects:

a) the determination of the Petitioner's guilt or innocence was completely dependent upon Itkin's credibility;

b) revelation of the fact that the government had instigated, directed or acquiesced in Itkin's perjuries, would have enhanced the Petitioner's claim that Itkin was a government agent. Such a finding, would have eliminated as evidence the jurisdictional acts which were performed by Itkin, as well as his extrajudicial declarations which were purportedly made in furtherance of the conspiracy;

c) Itkin's willingness to commit perjury, as well as the government's willingness to permit or direct such perjury,

would have deprived the evidence gathering process, itself, of credibility.

Professor Wigmore has succinctly stated the applicable principals as follows (3rd Ed., Vol. IIIA):

> "Section 957. *Willingness to Swear Falsely.* A willingness to swear falsely is beyond any question, admissible as negativing the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence:
>
> "1883 O'Neil, J. in *Anon.* 1 Hill S.C. 258:
>
> 'It was proved that Nimrod Mitchell had said that if he heard any man say he would not swear or lie, he would not believe him, for on some particular occasions *he* would, for he thought any man would. The substance of th s declaration was that he would not on some occasions, feel himself bound to declare the truth on oath . . . The man who believes that he is under no legal or moral obligation at all times and under all circumstances to tell the truth under the sanction of an oath has destroyed the only test by which he can claim credit at the hands of men. Such evidence is not establishing a bad character from particular facts.'"

It is clear that specific instances of conduct of a witness, even though not the subject of a conviction, are proper subjects of cross-examination "if clearly probative of truthfulness or untruthfulness and not remote in time" [*Proposed Rules of Evidence for the United States Courts and Magistrates* (March, 1971), Rule 608(b).]. *A fortiori*, this would be the case where, as here, the witness had admitted these perjuries to those who vouched for his credibility by using him as a witness and where, according to the witness, his sponsors had been accomplices in his perjury. See also, Wigmore, *supra*, Sections 958 and 959.

This court has repeatedly followed this reasoning. In *Napue* v. *Illinois*, 360 U.S. 264 (1959), it was held that:

> "The jury's estimate of the truthfulness and reliability of a government witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." 360 U.S. at 269.

More recently, in unanimously reversing a judgment of the United States Court of Appeals for the Second Circuit, this Court said:

> *"Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case*, and evidence of any understanding or agreement as to a future prosecution *would be relevant to his credibility and the jury was entitled to know of it.*
>
> "For these reasons, the due process requirements enunciated in Napue and the other cases cited earlier, require a new trial and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion." *United States* v. *Giglio*, — U.S. — (February 24, 1972).

It has been widely recognized that cross-examination as to the "trait of veracity" and as to "a propensity to disregard the obligation of an oath" is always material to the trial of a criminal case, unlike other types of impeachment which go merely to the general character of a witness, *United States* v. *Provo*, 215 F.2d 531, 537 (2nd Cir., 1954). See also: *Simon* v. *United States*, 123 F.2d 80, 85 (4th Cir., 1941);

United States v. *Kubacki*, 237 F. Supp. 638 (E.D., Pa., 1965); *Lyda* v. *United States*, 321 F.2d 788 793 (9th Cir., 1963); *United States* v. *Segelman*, 83 F. Supp. 890, 893 (W.D. Pa., 1949).

This Court has held that previously undisclosed evidence of perjury by a government witness, where the witness was a professional informer, was so material to the integrity of the fact-finding process that a new trial was required, even if there had been no suppression by the prosecution (*Mesarosh* v. *United States*, 352 U.S. 1 (1956); *Communist Party* v. *Subversive Activities Board*, 351 U.S. 115 (1956).

In *Mesarosh*, evidence of incidents of suspected perjury by the government witness (Mazzei) was discovered after the trial and conviction of the defendant.*

Nevertheless, it was held that a new trial was required in view of the fact that the confessed perjuror was a government informer and professional witness. Under such circumstances, "the integrity of a criminal trial in the Federal Courts" is involved (352 U.S. at 3).

Mesarosh had been convicted of violating the Smith Act and the general conspiracy statute (18 U.S.C. §§ 2385, 371), by conspiring to advocate the overthrow of the United States Government. After the conviction, the government itself came forward with the admission that Mazzei, a government informant and the chief witness against defendant at trial, *might*, have perjured himself in proceedings both before and after the conviction. Such possible perjuries

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* There was no contention that the evidence had been suppressed at the time of trial because (a) all but one of the incidents of suspected perjury by the government witness had occurred *after* the trial, and (b) the one pre-trial example of perjury had occurred in a State court proceeding of which the government concededly had no knowledge at the time of trial.

included testimony that he had falsely pleaded guilty to charges of adultery and bastardy because he was "induced to plead . . . but did so only in his official capacity (as a government informant) at the insistence of his superior in the FBI to avoid testifying" 352 U.S. at 5.

In directing a new trial (and rejecting the government's suggestion that the matter be remanded to the District Court for a determination as to whether a new trial was required), this Court held (352 U.S. at 9-11):

> "It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense *ordinarily* will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial.
>
> "Here we have an entirely different situation. The witness Mazzei was a paid informer of the government—he had been in its employ from 1942 to 1953 for the purpose of infiltrating the Communist Party and reporting the facts found. He testified in this case in that capacity, as a government witness. It is the government which now questions the credibility of its own witness because in other proceedings in the same field of activity, he gave certain testimony—some parts of it positively established as untrue, and other parts of it believed by the Solicitor General to be untrue. The Solicitor General conceded that without Mazzei's testimony in this case, the conviction of two of the petitioners cannot stand,

> *but he argued that as to the other three, Mazzei's evidence may not have had a substantial effect.* But the trial judge believed Mazzei's testimony was material against them for, over objection, he admitted it against all the defendants. There were only seven witnesses. Testimony of Mazzei, at least, gave flesh and blood reality to the mass of Communist literature read to the jury to show advocacy of violence by the Communist Party. This being so, it cannot be determined conclusively by any court that his testimony is insignificant in the general case against the defendants. Thus it has tainted the trial as to all petitioners" [emphasis added].

In the instant case (a) the perjury is not only clearly admitted by the government, but has been admitted by the witness itself (b) the newly discovered evidence bears not only on the witness' credibility but on two principal factual issues in the case—whether Itkin was a government agent and whether the government was implicated in his criminal activities, and (c) the evidence was never adduced by the government but was suppressed by the government at all stages of this case.

In view of these uncontested facts, the Court of Appeals' attempt to distinguish *Mesarosh* offends logic. True, the Government there questioned the credibility of its own witness. However, the basis for questioning Itkin's credibility is a matter of public record based upon his own sworn admissions of perjury. Since the Government, itself, was a party to some of that perjury, it hardly stands in a position to be the sole judge of whether the jury should have been informed of it.

2. The Petitioner was deprived of due process of law and of the right to the effective assistance of counsel, when the Government failed to disclose, at the time of trial, its knowledge of Itkin's perjuries and its own complicity in those perjuries.

While testifying as a Government witness, Itkin has stated that he revealed his perjuries in the custody proceedings and in his trust agreement to the United States Attorney's office (*supra*, pp. 11, 13-14). Similarly, he has testified that he revealed his perjury in the bankruptcy proceedings to the FBI within a day or two after having perjured himself (*supra*, p. 14).

The Government has never denied that Itkin perjured himself, that he did so under the circumstances and for the purposes he states, or that the United States Attorney's office was aware of all this at the Petitioner's trial. The failure of the Government to bring these facts to the attention of the Petitioner's counsel constituted a suppression of material evidence and requires a new trial.

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the basic rule governing the obligation of the prosecutor to disclose evidence to the defense is set forth as follows:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution" 373 U.S. at 87.

It is immaterial that the suppressed evidence goes only to the witness' credibility. *Napue* v. *Illinois*, 360 U.S. 264, 269-70 (1959); *United States* v. *Giglio*, — U.S. — (February 24, 1972).

In *Giglio*, this Court said:

> "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule."

Finally, the rationale of *Mesarosh* v. *United States*, *supra*, pp. 28-30, compels the conclusion that where a witness' perjury, in other matters, is known to the Government at the time of trial, it must reveal this information to the defense. *Mesarosh* devised a drastic remedy for a situation where the Government had been ignorant of the alleged perjury. Here that is not the case. The Government knew about it and failed to reveal it to the defense.

3. The Government suppressed evidence of material importance to the defense when it failed to reveal the many facts which have now been uncovered concerning Itkin's relationship with the Government.

We will not repeat here the massive amount of information which has now been uncovered concerning the nature and extent of Itkin's relationship with the Government. We respectfully refer the Court to our analysis *supra*, at pp. 8-23.

The Court of Appeals does not suggest, as it cannot, that any of this information was available to the defense at the time of trial. Rather, it is content to point to the fact that none of this evidence reveals that Itkin was specifically told by the Government to investigate the Petitioner or to infiltrate the highline venture (44a-45a).

We have never contended that we *know* of any specific direction by the CIA or the FBI for Itkin to target DeSapio or to investigate the City's dealings with Con Edison. Our point is that the newly discovered evidence of Itkin's relationship with these agencies is such as to leave no doubt

that he was their agent, and that he had the specific assignment of criminal infiltration on a long-term basis. The average policeman does not have any more of a particularized assignment. His job is to walk his beat and ferret out crime where he finds it. Itkin's job was to infiltrate where he could as the occasion presented itself.

The attempt to belittle the substance and effect of the newly discovered evidence, is to be compared with the District Court's charge on circumstantial evidence (Tr. 2656-2657) and conspiracy (Tr. 2673-2676). If facts analogous to those constituting the newly discovered evidence were proven against defendants charged with conspiracy, there is no doubt that a guilty verdict would be sustained. There is no reason why Itkin's relationship with the Government should be judged by any other standard.

In failing to reveal this information to the defense at the time of trial, the Government clearly violated the requirements of due process as set forth in *Brady* v. *Maryland*, 373 U.S. 83 (1963). There is no doubt that proof of Itkin's status as a Government agent would have deprived the Government of the jurisdictional acts upon which this prosecution was based. Since Itkin performed them, such proof would have rendered inadmissible his extrajudicial statements.

In *Crawford* v. *United States*, 212 U.S. 183 (1909), this Court held:

> "There is a presumption of harm arising from the existence of an error against the party complaining, excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such error against a party seeking to review it is not cause for reversal of the judgment." 212 U.S. at 203.

By the above standard, the Petitioner is clearly entitled to a new trial.

4. The Petitioner was entitled to an evidentiary hearing as to the facts which he sought to establish by the motion for a new trial.

The opinions of the Court of Appeals and of the District Court are laden with innuendo, casting unspecific doubt upon whether some of the evidence was, in fact, unknown to the defense at the time of trial, and as to whether Itkin's quoted testimony means what the Petitioner claims it means.

An evidentiary hearing would have been the only means by which these doubts could have been put to rest; however, such a hearing has been denied to the Petitioner based upon the proposition that ". . . the time for finality has come." (47a). We submit that this approach is unbecoming to the administration of justice in the Courts of the United States.

The wealth of material which was produced by the defense in support of the motion, and about which there can be no doubt the defense was uninformed at the time of trial, fully warrants an evidentiary hearing in which the air can be cleared and the true facts can become known. The aura of secrecy which has been imposed upon the nature and extent of the Government's relationship with Itkin is the element which will permanently deprive this case of any true finality. Censored truth as to material facts has no place in a Court of law.

For these reasons, we submit that the new trial standards of Rule 33, F.R. Crim. P., clearly require that a hearing be held.

Moreover, that aspect of the defendant's motion which alleges suppression of evidence by the United States is grounded upon the guarantees of the Fifth and Sixth Amendments of the Constitution. The following provision of 28 U.S.C. § 2255 is, therefore, controlling:

> "Unless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief, *the court shall . . . grant a prompt hearing thereon* . . . * * *" [Emphasis added.]

In such circumstances, a defendant's rights to a hearing and to reversal do not turn upon the sufficiency of the evidence, but whether or not he has *prima facia* established that there has been an oppressive suppression of truth by the government. *Berger* v. *United States*, 295 U.S. 78 (1934); *United States* v. *Zbrowski*, 271 F.2d 661, 668 (2d Cir. 1959); *Napue* v. *Illinois*, 360 U.S. 264, 269-270 (1959).

The District Court cannot, by judicial clairvoyance, determine from affidavits alone that the new evidence concerning Itkin's credibility and status would not affect a jury's determination. It is noteworthy that in *Lipkins*, the only "Itkin prosecution" in which most of this evidence was used, the defendant was acquitted.

See: *Dunn* v. *United States*, 245 F.2d 407 (6th Cir., 1957); *Smith* v. *United States*, 259 F.2d 125 (9th Cir., 1958); *United States* v. *Derosier*, 229 F.2d 599 (3rd Cir., 1956); *James* v. *United States*, 175 F.2d 769 (5th Cir., 1949).

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted, the judgment of conviction should be reversed and a new trial should be granted; in the alternative, the case should be remanded to the District Court for an evidentiary hearing upon the issues presented.

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No. 71-1213

In the Supreme Court of the United States

OCTOBER TERM, 1971

CARMINE G. DE SAPIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having conspired to obstruct commerce through extortion and to travel interstate and use interstate facilities to commit bribery (18 U.S.C. 371) and of two substantive violations of 18 U.S.C. 1952 with respect to bribery. He was sentenced to concurrent prison terms of two years and fined $4500. The conviction was affirmed on appeal. 435 F.2d 272, certiorari denied, 402 U.S. 999.

The present case involves petitioner's second motion for a new trial based on alleged newly discovered evidence concerning the government's principal witness, Itkin. The district court denied relief (Pet. App. C 48-56) and the court of appeals affirmed (Pet. App. B 33-47). These opinions, on which we rely, fully answer petitioner's various contentions which present no issue of general importance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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